1993

Claudia Cox v. Utah Power and Light/Energy Mutual Insurance, Employers Reinsurance Fund, and The Industrial Commision of Utah : Brief of Petitioner

Utah Court of Appeals

Erie V. Boorman; Sharon Eblen; Rinehart L. Peshell.
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IN THE UTAH COURT OF APPEALS

CLAUDIA COX, Applicant/Petitioner v. UTAH POWER AND LIGHT/ ENERGY MUTUAL INSURANCE, EMPLOYERS REINSURANCE FUND, and THE INDUSTRIAL COMMISSION OF UTAH, Defendants/Respondents.	Case No. 930342-CA Priority No. 7 Industrial Commission No. 92000255

BRIEF OF PETITIONER

PETITION FOR REVIEW OF INDUSTRIAL COMMISSION ORDER

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JURISDICTION

Jurisdiction in this Court is appropriate pursuant to Utah Code Ann. § 35-1-82.53(2) (1988); Utah Code Ann. § 35-1-86 (1988); Utah Code Ann. § 63-46b-16 (1989); Utah Code Ann. § 78-2a-3(2)(a) (1988); and Utah R. App. P. 14.

STATEMENT OF ISSUES AND APPLICABLE STANDARDS OF REVIEW

There are no disputed issues of fact; for purposes of this appeal, petitioner accepts the Administrative Law Judge's (ALJ) findings of fact. In dispute is the application of law to the facts found by the ALJ and Industrial Commission. Based upon the undisputed findings of fact, the issues are:

a. Whether there is medical causation between the applicant's industrial injuries and her permanent and total disability.

Standard of review: As to the application of facts to law or interpretation of law, correction of error standard of review without deference to the decision of the administrative agency, pursuant to Utah Code Ann. § 63-46b-16(4); *Willardson v. Industrial Commission*, 216 U.A.R. 12 (Utah App. June 28, 1993). *King v. Industrial Com'n of Utah*, 850 P.2d 1281, 1286 (Utah App. 993); *Luckau v. Board of Review*, 840 P.2d 811 (Utah App.

1992); *Morton International, Inc. v. Auditing Division*, 814 P.2d 581 (Utah 1991).

b. Whether applicant qualifies under the "odd lot doctrine" for permanent and total disability.

Standard of review: As to the application of facts to law or interpretation of law, correction of error standard of review without deference to the decision of the administrative agency, pursuant to Utah Code Ann. § 63-46b-16(4); *King v. Industrial Com'n of Utah*, 850 P.2d 1281, 1286 (Utah App. 1993); *Luckau v. Board of Review*, 840 P.2d 811 (Utah App. 1992); *Morton International, Inc. v. Auditing Division*, 814 P.2d 581 (Utah 1991).

DETERMINATIVE STATUTES

Utah Code Ann. § 35-1-45 (1988).

Utah Code Ann. § 35-1-67 (1988).

Attached hereto in appendix A of the Addendum.

STATEMENT OF THE CASE

A. Nature of the case.

This is a petition for review of an Industrial Commission of Utah Order denying petitioner's motion for review of the Administrative Law Judge's (ALJ) denial of permanent, total disability benefits.

B. Course of proceedings below.

Applicant/petitioner Claudia Cox filed an application for hearing seeking unpaid medical expenses, temporary total disability compensation, permanent partial impairment compensation, permanent total disability and interest on February 13, 1992, for an accident which she suffered in the course of employment on August 15, 1988. (R. 1). A hearing was held before an Administrative Law Judge of the Industrial Commission of Utah on August 5, 1992. The Administrative Law Judge's Findings of Fact, Conclusions of Law and Order denying benefits was issued on February 4, 1993. (R. 64-87; Findings of Fact, Conclusions of Law and Order, attached hereto in Appendix B of the Addendum).

Cox filed her Motion for Review with the Industrial Commission on March 5, 1993. (R. 88). The Industrial Commission issued its Order Denying Motion for Review on April 28, 1993. (R. 116-124; Order Denying Motion for Review, attached hereto in Appendix C of the Addendum). Thereafter, Cox filed her Petition for Writ of

Review (R. 125) with this Court on May 27, 1993, which Writ of Review (R. 130) was issued June 10, 1993.

C. Disposition below.

The Administrative Law Judge (ALJ) denied benefits, finding that the relatively small portion of the petitioner's overall disability which was caused by her industrial injury was insufficient to support medical causation between Cox's permanent total disability and the industrial accident. The Industrial Commission thereafter denied Cox's Motion for Review of the Order denying benefits, from which denial this petition for review is taken.

STATEMENT OF FACTS

For purposes of this appeal, applicant/petitioner accepts the findings of fact of the ALJ and the Industrial Commission. Below are the relevant facts of this appeal, as found by the ALJ and Industrial Commission.

1. Claudia Cox, born March 10, 1940, began working for Utah Power and Light in a clerical/accounting position in 1977. (R. at 66; Appendix B at 3.)

2. Ms. Cox had various back problems for which she sought intermittent treatment from 1963 until 1986. (R. 66-7; Appendix B at 3-4.)

3. On October 4, 1986 Ms. Cox was injured while riding in the back of a pick-up truck in Albuquerque, New Mexico. Ms. Cox suffered an acute and chronic lumbar radiculopathy secondary to centrally herniated L4-5 disc, a mild buldge of the L3-4 and a cervical radiculopathy secondary to encroachment upon the nerve roots C4-5 and C5-6 bilaterally. As a result of these injuries, Ms. Cox underwent surgery on January 5, 1987 whereby a semi-hemi laminotomy, foraminotomy and nerve root decompression at L4-5 were performed. (R. 68; Appendix B at 5.)

4. On August 5, 1987 Ms. Cox was released by her physician to return to work. (R. 69; Appendix B at 6.)

5. In December 1987, Ms. Cox suffered the first of two industrial accidents. As Ms. Cox went to sit on her chair, the chair rolled back and away from her. Ms. Cox fell to the floor on her buttocks, which resulted in back pain and muscle spasms. (*Id.*)

6. On August 15, 1988, Ms. Cox suffered a second, and more significant, industrial accident. Ms. Cox was filling in for other workers who were on vacation. She attempted to open the bottom drawer of one of her co-worker's file drawers. Unbeknownst to Ms. Cox, the drawer was filled with heavy books and papers. When she tried to open the drawer, it stuck, jarring Ms. Cox's neck and back. Ms. Cox suffered severe and lasting pain in her back, neck and arms. Ms. Cox continued to work despite being in pain,

which she tried to manage with pain medications and muscle relaxers. (R. 70; Appendix B at 7.) Ms. Cox filed an accident report (R. 16), and her description of the accident is corroborated by her co-employees and supervisor. (R. 17-18; attached hereto as Appendix G of the Addendum.)

7. Finally on July 9, 1990 Ms. Cox was unable to continue working because of her pain. (R. 73; Appendix B at 10.)

8. Ms. Cox filed an application for hearing seeking unpaid medical expenses, temporary total disability compensation, permanent partial impairment compensation, permanent total disability and interest on February 13, 1992, for the August 15, 1988 industrial accident. (R. 1).

9. On November 3, 1992, Ms. Cox was referred to a medical panel for evaluation, which issued its report on November 27, 1992. The ALJ adopted the medical panel report to resolve all issues of causation and impairment. (R. 80; Appendix B at 17).

10. The medical panel found Ms. Cox to be suffering from a 36% whole person permanent impairment. (R. 78; Appendix B at 15).

11. Of Ms. Cox's 36% whole person impairment, 2.83% is attributable to the industrial injury she suffered on August 15, 1988. *Id.*

12. Of Ms. Cox's 36% whole person impairment, 1.27% is attributed to the industrial injury she suffered in December, 1987. *Id.*

13. The remaining percentage of Ms. Cox's whole person impairment stems from her preexisting condition. *Id.*

14. Nothing has contributed to Ms. Cox's whole person impairment rating since the industrial accident on August 15, 1988. *Id.*

15. The medical panel found that "there is a causal connection between the applicant's symptoms" and the industrial accidents. *Id.*

16. The ALJ found that Ms. Cox's testimony that her condition worsened after her August 15, 1988 injury is supported by the medical records. (R. 82; Appendix B at 19).

17. On December 21, 1992, Ms. Cox was declared by Social Security to be disabled. (R. 51-57, 65; Social Security Decision attached hereto Appendix F at 1-6, Appendix B at 2).

18. The Social Security Disability decision lists ten (10) separate medical problems that contribute to Ms. Cox's disability. Of those 10 problems, there is a possibility that six (6) are caused by the industrial accidents. (R. 54-55, 83; Appendix F at 2-3, Appendix B at 20).

19. Delvin McFarlane, LCSW, upon evaluating Ms. Cox, determined on March 30, 1992 that there was no way that Ms. Cox could return to work and that she should receive a speedy disability retirement. (R. 76; Appendix B at 13).

20. A functional capacity evaluation of Ms. Cox at Carbon Emery Physical Therapy/Alta Health Services determined that she could only participate in light/sedentary work. *Id.*

21. The ALJ found that Ms. Cox is "probably totally disabled." (R. 85; Appendix B at 22).

22. Legal causation is not disputed. (R. 81; Appendix B at 18).

23. The ALJ denied Ms. Cox's application for permanent total disability benefits, finding that the industrial accidents minimally contributed to the applicant's overall disability. (R. 82-5; Appendix B at 19-22), and that Ms. Cox had other medical problems which "could have affected the applicant's ability and motivation to continue working." (R. 82; Appendix B at 19).

24. The Industrial Commission of Utah affirmed the ALJ's finding, stating that "The relatively small proportion of the applicant's impairment that was attributed to the industrial accident of August 15, 1988, is, in our view, insufficient to support a finding that the applicant's permanent total disability

was caused by that industrial accident." (R. 122; Appendix C at 7).

SUMMARY OF ARGUMENT

1. The Worker's Compensation Act is legislation with the humane purpose of protecting and providing compensation to injured employees. The Act should be liberally construed to effect this purpose. The Administrative Law Judge erred when she failed to consider this claim liberally and award benefits. Construing Ms. Cox's claim liberally, she adequately met her burden of demonstrating that her injuries and disability were medically caused, at least in part, by her industrial injuries.

2. Even if Ms. Cox's ability to work is affected by "non-industrial" factors, she qualifies for permanent total disability under the "odd-lot" doctrine.

ARGUMENT

Issue No. 1

The ALJ and the Industrial Commission applied the wrong standard of causation to Applicant's disability.

In considering Ms. Cox's claims, it must be remembered that the Worker's Compensation Act should be given a liberal construction in order to fulfil its purpose of protecting employees and providing financial security. *State Tax Comm'n v. Industrial Comm'n of Utah*, 685 P.2d 1051, 1053 (Utah 1984). This court has recently reaffirmed this construction, holding that, "[i]n order to

fulfill the purpose of worker's compensation, 'the Act should be liberally construed and applied to provide coverage' and any doubts should be resolved in favor of the applicant." *Luckau v. Board of Review*, 840 P.2d 811, 815 (Utah App. 1992) (*quoting State Tax Comm'n*, 685 P.2d at 1053). *See also McPhie v. Industrial Comm'n*, 567 P.2d 153 (Utah 1977).

In this case, the ALJ and the Industrial Commission did not give the applicant the benefit of the doubt in any regards and thus have defeated the purpose of this act, leaving Ms. Cox without remedy. There is substantial evidence that Ms. Cox's disability was caused, in part, by her industrial accidents. Yet the issue of causation gets muddied by Ms. Cox's pre-existing back conditions, along with her evident emotional and socio-economic symptoms resulting from her disability. The ALJ and Commission got sidetracked by these collateral issues. Instead of giving Ms. Cox the benefit of the doubt, the ALJ speculated on other factors which might have caused her permanent total disability.

Giving the applicant the benefit of the doubt in these circumstances, an award of benefits is appropriate. Our Supreme court has held that "[p]olicy considerations in worker's compensation cases dictate that statutes be liberally construed in favor of an award." *Tisco Intermountain v. Industrial Comm'n of Utah*, 744 P.2d 1340, 1343 (Utah 1987). While "policy

considerations have no application *in the absence of any evidence to support an award...," id.* (emphasis added), this is not such a case. As can be seen in the statement of facts and the following sections, there is substantial evidence that applicant's disability was caused in part by her industrial accidents. As such, the benefit of the doubt should have been given to the applicant. The ALJ and Industrial Commission erred in failing to do so by applying an incorrect burden of proving medical causation.

Ms. Cox's application for permanent and total disability was denied because of the application of erroneous standards of medical causation.[1] Ms. Cox has never asserted that her pre-existing and subsequent medical problems are not partially responsible for her disability and inability to work. However, her industrial accidents have contributed to her permanent and total disability, and thus are compensable.

The ALJ construed the issue in this case as "whether the August 15, 1988 compensable industrial injury is **the cause** of the applicant's current permanent total disability." (R. 81; Appendix

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[1] The court in *Allen v. Industrial Comm'n*, 729 P.2d 15 (Utah 1986) set forth two causation requirements for a person with a pre-existing condition. The first is legal causation, which dictates that one must show that "[t]he employment contributed something substantial to increase the risk he already faced in everyday life..." *Id* at 25. Clearly, the ALJ found legal causation, but denied benefits based upon medical causation. (R. 70, 81; Appendix B at 7, 18). Legal causation was not disputed. *See* Appendix G. (R. 16-8). Therefore legal causation need not be addressed.

B at 18)(emphasis added). The ALJ's application of a causation standard of ***exclusive causation*** does not conform to the standard set forth by the Utah Supreme Court in *Allen v. Industrial Comm'n*, 729 P.2d 15 (Utah 1986). Other comments by the ALJ indicate that she also applied a ***significant contribution*** standard, again in violation of the *Allen* standard.

The Industrial Commission affirmed the ALJ's application of this erroneous standard, itself applying a ***significant contribution standard***, stating that the "relatively small proportion of the applicant's impairment that was attributed to the industrial accident ... is, in our view, insufficient to support a finding that the applicant's permanent total disability was caused by that industrial accident." (R. 122; Appendix C at 7). Neither the exclusive causation, nor the significant contribution standards applied by the ALJ and Industrial Commission are found in Utah workers' compensation law.

Where, as in this case, there is some medical causation between the industrial accident and the disability, it is error to deny benefits on the basis of finding other, ***concurrent, more significant*** causations. "Just because a person suffers a preexisting condition, he or she is not disqualified from obtaining compensation. Our cases make clear that 'the aggravation or

lighting up of a pre-existing disease by an industrial accident is compensable." *Allen*, 729 P.2d at 25.

To show medical causation, a claimant must "prove the disability is medically the result of an exertion or injury that occurred during a work-related activity." *Id.* at 27. A claimant does not have to prove that her disability was wholly caused by the injury, but only has to show by a preponderance of the evidence "**a medically demonstrable causal link** between the work-related exertions and the unexpected injuries that resulted from those strains." *Id.*(emphasis added). The *Allen* court further reiterated that exclusive causation is not the proper medical causation standard. "We are mindful that the **key question in determining causation is whether, given this body and this exertion, the exertion in fact *contributed* to this injury.**" *Id.* at 24 (emphasis and italics added).

This court most recently reiterated this medical causation standard in *Willardson v. Industrial Commission*, 216 U.A.R. 12 (Utah App. June 28, 1993). In that case the petitioner argued that because the ALJ prefaced his finding of no causation with the word "significant contribution," that the ALJ applied an erroneous causation standard. This court held:

> Petitioner correctly asserts that there is no requirement in the applicable statute that the work-related activities "significantly" contribute to an injury in order for a

> compensable industrial accident to occur. **The only requirement is that there be a medical and legal causal relationship between petitioner's condition and work-related activities, significant or otherwise.**

Id. at 14 (emphasis added).[2]

The petitioner's claim for disability in *Willardson* was ultimately rejected because this court found that the word "significantly" was unintended surplusage, and that the ALJ and Commission did not in fact use a "significant contribution" standard in finding medical causation. *Id.* However looking at the ALJ and Commission's findings in the present case demonstrates that a "significant contribution" standard was indeed applied. Such an application violates the "medically demonstrable causal link" standard set forth in *Allen* and reaffirmed in *Willardson*.

As outlined above, the ALJ relied upon the medical panel's findings, which have not been challenged. The medical panel assigned Ms. Cox a 36% whole person impairment rating. Of that 36% whole person impairment, 2.83% is a result of the industrial injury suffered on August 15, 1988 and 1.27% is a result

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[2] For further support of a non-exclusive or non-proportional causation requirement, *see Virgin v. Bd. of Review of Indus. Com'n*, 803 P.2d 1284, 1288 n. 4 (Utah App. 1990), where this court noted that Utah courts deny benefits only when "the disability was ***solely*** the result of a pre-existing condition" and where "the disability was due ***entirely*** to a pre-existing condition." *Id.* (*Citing Lancaster v. Gilbert Dev.*, 736 P.2d 237 (Utah 1987); *Olsen v. Industrial Comm'n*, 776 P.2d 937, 939 (Utah App. 1989) *aff'd*, 797 P.2d 1098 (Utah 1990).

of the industrial injury she suffered in December, 1987. Nothing has contributed to Ms. Cox's whole person impairment rating since the industrial accident on August 15, 1988. The medical panel found that "there is a causal connection between the applicant's symptoms" and the industrial accidents. The ALJ found that Ms. Cox's testimony that her condition worsened after her August 15, 1988 injury is supported by the medical records. The ALJ found that Ms. Cox is "probably totally disabled." Yet despite these findings, benefits were denied because "there is alot [sic] of evidence that leads one to the conclusion that the August 15, 1988 injury only minimally contributed to the applicant's overall disability." (R. at 82; Appendix B at 19). Clearly, the ALJ applied the more onerous and incorrect "significant contribution" standard.[3]

Likewise the Industrial Commission erroneously apportioned causation in its denial of benefits:

> The relatively small proportion of the applicant's impairment that was attributed to

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[3] The defendant, in arguing to the Industrial Commission for the application of as much as an exclusive or significant contribution standard, admitted that Ms. Cox met the "medically demonstrable link" causation standard. It argued to the Industrial Commission that "The most that can be found are medical opinions that said accident contributed to Applicant's overall disability." (R. at 106; Memorandum of Points and Authorities in Opposition to Applicant's Motion for Review at p. 5, attached herein in appendix E of the Addendum). If the accident contributed to Ms. Cox's disability, then benefits are appropriate.

> the industrial accident of August 15, 1988, is, in our view, insufficient to support a finding that the applicant's permanent total disability was caused by that industrial accident.

(R. 122; Appendix C at 7).

Indeed, as noted above, the ALJ may have applied a sole causation standard, clearly an incorrect burden, as seen in her findings that:

> Although some of the applicant's medical care providers have pointed to the applicant's back and neck problems and her loss of her job as causes of her current disability, **none have indicated clearly that the industrial injuries are the sole cause of her back and neck problems and the loss of her job.**

(R. 80; Appendix B at 17) (emphasis added).

The August 15, 1988 industrial accident is the "straw that broke the camel's back." Though the percentage of Ms. Cox's whole person impairment attributable to the accident is less than that attributed to her prior non-industrial accidents, it is the August 15th accident that made her body dysfunctional for employment purposes, and rendered the applicant totally disabled.

The ALJ relied upon the fact that Ms. Cox continued to work after her August 15, 1988 accident to show that her industrial accidents did not result in her permanent disability. (R. 91, attached hereto in Appendix D of the Addendum; R. 82-84; Appendix B at 19-21). Such a finding is in error, as permanent total

disability benefits may be awarded even though a claimant has returned to work following the industrial injury. *Peck v. Eimco Process Equipment Co.*, 748 P.2d 572, 574 (Utah 1987). This principle was articulated by the Utah Supreme Court in *Norton v. Industrial Com'n*, 728 P.2d 1025, 1027-28 (Utah 1986):

> With respect to the administrative law judge's finding that Norton's continued work for six years was proof that he was not totally disabled in 1983, it should be pointed out that that fact standing alone does not foreclose Norton's claim. The administrative law judge correctly considered Norton's return to work as one factor to be weighed in determining his disability. He erred when he failed to consider the *condition* under which Norton continued his employment, as manifested by his finding "the very fact that the applicant continued to work in underground mining for six years following his accident is convincing evidence that his accident did not render him permanently and totally disabled." Norton's decision to return to work did not automatically disqualify him from receiving permanent total disability benefits, where the facts indicate that throughout the remainder of his employ he was not restored to health. The evidence is undisputed that Norton spent the last six of his working years in considerable pain.

Id.

Likewise, the ALJ in the present case found that Ms. Cox's condition worsened after her August 15, 1988 accident. (R. 82; Appendix B at 19). She continued to work in pain by relying on pain medications and curtailing virtually all other activities. The medical panel found that "there is a causal connection between

the applicant's symptoms" and the industrial accidents. *Id.* Based upon such findings of fact, it was error for the ALJ and the Commission to find that there was no medical causation between Ms. Cox's industrial injuries and her permanent and total disability.

Issue No. 2

The applicant is entitled to permanent and total disability under the "odd-lot" doctrine.

Likewise the ALJ and Industrial Commission failed to liberally construe the Worker's Compensation Act in rejecting Ms. Cox's claim that she was entitled to benefits under the "odd-lot" doctrine. Permanent total disability benefits should be granted "[w]hen a relatively **small percentage of impairment** caused by an industrial accident **is combined with other factors** to render the claimant unable to obtain employment." *Zimmerman v. Industrial Comm'n of Utah*, 785 P.2d 1127, 1131 (Utah App. 1989) (emphasis added). These factors include a claimant's "age, education, training and mental capacity." *Marshall v. Industrial Comm'n*, 681 P.2d 208, 211 (Utah 1984). "It is the unique configuration of these factors that together will determine the impact of the impairment on the individual's earning capacity." *Id.*

There is no question that Ms. Cox is totally disabled and unemployable. Ms. Cox has been declared by Social Security to be disabled. (R. 54-55, 83; Appendix F at 2-3, Appendix B at 2). Two

independent functional capacity evaluations determined that Ms. Cox cannot return to work. (R. 76; Appendix B at 13.) The ALJ found that Ms. Cox is "probably totally disabled." (R. 85; Appendix B at 22).

The ALJ and Commission premised their denial of disability benefits upon other non-industrial factors which may have contributed to Ms. Cox's inability to work. Such factors include depression, fatigue, hypothyroidism, fibromyalgia, polyarthritis, polypharmacy, degenerative joint disease and degenerative disc disease. (R. 77, 82, 84-5, 122; Appendix B at 14, 19, 21-22; Appendix C at 7). Further, the defendant asserted in arguing against the motion for review that Ms. Cox's limited high school education and her "lack of transferable skills, prior back surgeries, and other medical problems not related to her industrial injury," contributed to her total disability. (R. 105-06; appendix E at 4-5).

Without doubt these non-industrial factors have contributed to Ms. Cox's total disability. Further there is no question that Ms. Cox is 36% whole person impaired, (R. 78; Appendix B at 15) and that the last two incidents contributing to this impairment rating were the industrial injuries she suffered on December, 1987, and on August 15, 1988. *Id.*

Given these facts, Ms. Cox is entitled to permanent total disability under the "odd-lot" doctrine. "Under the odd-lot doctrine, ... total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." *Peck*, 748 P.2d at 575 (*quoting Marshall*, 681 P.2d at 212; 2 Larson, *The Law of Workmen's Compensation* § 57.51, at 10-164.24 (1983)). To qualify for benefits under the odd lot doctrine, an employee first must show that "'he or she can no longer perform the duties required in his or her occupation.'" *Zupon v. Industrial Commission*, 221 UAR 37, 37-8 (Utah App. Sept. 14, 1993)(*quoting Zimmerman*, 785 P.2d at 1131). Second, the employee must show that she cannot be rehabilitated. *Zupon*, 221 UAR at 38; *Zimmerman*, 785 P.2d at 1131. The burden then shifts to the employer to demonstrate that the employee can perform steady work. *Id.*

Ms. Cox qualifies for permanent and total disability under the odd-lot doctrine. She has a permanent impairment which has been medically caused, at least in part, by an industrial accident. She is fifty-three years old, has minimal schooling, no transferable skills and severe non-industrial related medical problems as well. These factors conspire to prevent her from returning to the work force or from being retrained in a capacity

that could accommodate her impairment. Because her industrial injuries have medically contributed to her disability, she is entitled to permanent total disability benefits.

CONCLUSION

Applying improperly rigid and inaccurate standards, the Commission failed to liberally apply the Worker's Compensation Act to give the benefit of the doubt to the applicant. This is in direct contravention of the policies and ideals long ago embraced by this Court and the Utah Supreme Court.

The facts as found by the ALJ and affirmed by the Industrial Commission establish that Claudia Cox did meet her burden of demonstrating that her injuries and disability were medically caused by her industrial injuries. Applying the correct causation standard of "*a medically demonstrable causal link*," Ms. Cox's industrial injuries caused her disability. The Industrial Commission erred in denying benefits.

Even if Ms. Cox's ability to work is affected by "non-industrial" factors, she nevertheless qualifies for permanent total disability under the "odd-lot" doctrine." The industrially related impairment, coupled with non-industrial factors, have rendered Ms. Cox disabled and entitled to benefits.

This Court is charged with correction of errors committed by the Industrial Commission. The undisputed facts of this case justify a reversal of the Industrial Commission's order denying Cox's Motion for Review. This Court should remand to the Industrial Commission with directions to enter an award of permanent total disability benefits to Claudia Cox.

DATED this 12 day of October, 1993.

EDWARD B. HAVAS
Attorney for Applicant/Petitioner

CERTIFICATE OF SERVICE

Pursuant to Utah R. App. P. 26(b), I hereby certify that two (2) true and correct copies of the **BRIEF OF PETITIONER** were mailed first class, postage pre-paid, this 12 day of October, 1993, to the following parties:

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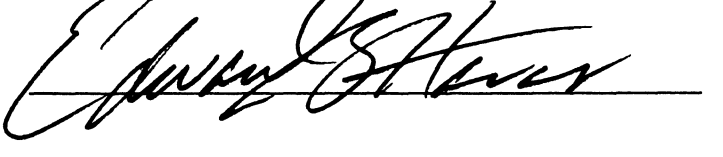

ADDENDUM

Appendix A:	**Determinative Statutes**
Appendix B:	**Findings of Fact, Conclusions of Law and Order**
Appendix C:	**Order Denying Motion for Review**
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Appendix A:

Determinative Statutes

Injury arising out of or in course of employment.

"Act of God" is not by implication excluded in Subdivision (5) of this section State Rd Comm n v Industrial Comm n, 56 Utah 252, 190 P 544 (1920)

Where mine superintendent was killed by holdup bandits as he entered store to purchase cigar for his own use, his death was not compensable as "accidental" injury within this section since in order to recover for accidental injury there must be some causal connection or relation between act causing injury and employment or duties of injured employee Westerdahl v State Ins Fund, 60 Utah 325, 208 P 494 (1922)

Where state road employee while working on road sought shelter from storm and was struck by lightning, the accident arose out of and in course of employment State Rd Comm'n v Industrial Comm'n, 56 Utah 252, 190 P 544 (1920)

Under Subdivision (5) although an employee is employed on the day of an accident, it cannot be said he is in the course of his employment where he steps aside to engage in an altercation with some third person concerning a personal grievance wholly unrelated to matters connected with his employment Wilkerson v Industrial Comm n, 71 Utah 355, 266 P 270 (1928)

Wife of deceased drugstore employee was not entitled to compensation where she did not sustain burden of proving that typhoid fever was result of injury received in course of his employment Chase v Industrial Comm n, 81 Utah 141, 17 P 2d 205 (1932)

Death of beer truck driver after being taken to the hospital when he had a severe pain in his chest after making his second morning delivery, did not result from an accident arising out of or in the course of his employment, where substance of opinions of medical panel was that death from coronary thrombosis with myocardial infarction was not caused from the exertion of deceased's work on that morning Burton v Industrial Comm'n, 13 Utah 2d 353, 374 P 2d 439 (1962)

Regular course of employment.

Bricklayer killed in automobile accident while returning home from work was not killed in an accident arising out of or in the course of employment despite fact that decedent's hourly wage had been increased due to location of construction site, increased hourly wage did not constitute pay for travel time Barney v Industrial Comm'n, 29 Utah 2d 179, 506 P 2d 1271 (1973)

COLLATERAL REFERENCES

C.J.S. — 99 C J S Workmen's Compensation § 1

A.L.R. — Suicide as compensable under Workmen's Compensation Act, 15 A L R 3d 616

Workmen's compensation injury or death due to storms, 42 A L R 3d 385

Workmen's compensation injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment, 47 A L R 3d 566

Master and servant employer's liability for injury caused by food or drink purchased by employee in plant facilities, 50 A L R 3d 505

Workers' compensation law as precluding employee s suit against employer for third person's criminal attack, 49 A L R 4th 926

Workers' compensation sexual assaults as compensable, 52 A L R 4th 731

Key Numbers. — Workers' Compensation ⇦ 47

35-1-45. Compensation for industrial accidents to be paid.

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

35-1-67. Permanent total disability — Amount of payments.

(1) In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section. Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised. The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), (e), and (f) (1) and (2), as revised.

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66⅔% of the employee's average weekly wage at the time of the injury, limited as follows:

(a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.

(b) Compensation per week may not be less than the sum of $45 per week, plus $5 for a dependent spouse, plus $5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (a) nor exceeding the average weekly wage of the employee at the time of the injury.

(c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

(3) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69. The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, and 35-1-66, in excess of the amount of compensation payable over 312 weeks at the applicable permanent total disability compensation rate under Subsection (2). Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(4) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation. Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69. Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the Employers' Reinsurance Fund shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

(5) A finding by the commission of permanent total disability shall in all cases be tentative and not final until all of the following proceedings have occurred:

(a) Upon tentatively determining that an employee is permanently and totally disabled, the commission shall, unless otherwise agreed by the parties, refer the employee to the vocational rehabilitation agency under the State Board of Education for rehabilitation training. The commission shall order that an amount be paid out of the Employers' Reinsurance Fund provided for by Subsection 35-1-68 (1), for use in the rehabilitation and training of the employee.

(b) If the vocational rehabilitation agency under the State Board of Education certifies to the commission in writing that the employee has fully cooperated with that agency in its efforts to rehabilitate the employee, and in the opinion of the agency, the employee is not able to be rehabilitated, the commission shall, after notice to the parties, hold a hearing to consider the agency's opinion as well as other evidence regarding rehabilitation. The parties may waive the right to a hearing. If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits. The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work. In any case where an employee has been rehabilitated or the employee's rehabilitation is possible, but where the employee has some loss of bodily function, the award shall be for permanent partial disability. An employee is not entitled to compensation, unless the employee fully cooperates with any rehabilitation effort under this section.

(6) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members, constitutes total and permanent disability, to be compensated according to this section. No tentative finding of permanent total disability is required in any such instance.

History: C. 1953, 35-1-67, enacted by L. 1988, ch. 116, § 4.

Repeals and Reenactments. — Laws 1988, ch. 116, § 4 repeals former § 35-1-67, as last amended by Laws 1985, ch. 160, § 1, relating to permanent total disability, effective July 1, 1988, and enacts the present section.

Amendment Notes. — The 1985 amendment substituted "$120" for "$110" in the first sentence of the second paragraph.

Effective Dates. — Section 2 of Laws 1985, ch. 160 provided: "This act takes effect upon approval by the governor, or the day following the constitutional time limit of Article VII, Sec. 8 without the governor's signature, or in the case of a veto, the date of veto override." Approved March 18, 1985.

NOTES TO DECISIONS

ANALYSIS

Arm injuries.
Commencement of benefits.
Determination of character of disability.
Estoppel.
Eye injuries.
Findings.
Law in effect.
Maximum benefits.
Multiple injuries.

Appendix B:

Findings of Fact, Conclusions of Law and Order

INDUSTRIAL COMMISSION OF UTAH

Case No. 92000255

CLAUDIA COX, Applicant, vs. UTAH POWER AND LIGHT/ ENERGY MUTUAL INSURANCE and EMPLOYERS REINSURANCE FUND, Defendants.	*	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on August 5, 1992 at 1:00 o'clock p.m. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The applicant was present and was represented by Edward B. Havas, Attorney.

The defendants were represented by Rinehart Peshell, Attorney.

The Employers Reinsurance Fund was represented by Erie Boorman, Attorney/Administrator.

This case involves a claim for permanent total disability benefits in relation to 3 industrial incidents occurring while the applicant was employed by Utah Power and Light (one in December of 1987, and two others that the applicant feels caused her permanent total disability, one on August 15, 1988 and one on July 9, 1990). No application for hearing was filed with resepct to the December 1987 incident, but it has been dealt with through out the litigation in this matter. The carrier and the Employers Reinsurance Fund deny that the applicant is permanently totally disabled as a result of any of her work injuries. The carrier argues that the 1988 and 1990 incidents contributed little to the applicant's already impaired cervical and lumbar spine and the carrier argues that the 1990 incident may be non-compensable. In support of this argument, the carrier points out that the applicant had all her spinal surgeries prior to the 1988 industrial incident

and the carrier notes that the applicant continued to work until July 1990. The applicant counters that the 1988 accident did indeed significantly worsen her condition and that she continued to work thereafter only because she maintained herself on pain medication. Both the carrier and the Employers Reinsurance Fund also question whether the applicant is truly unable to work at any job. At the time of the hearing, the applicant was in the process of appealing a denial of Social Security Disability benefits and the Social Security Disability records and other vocational assessment included in the medical record exhibit at the time of the hearing suggested that the applicant could possibly still work. However, just after the medical panel submitted its report to the Commission, the applicant was awarded Social Security Disability benefits pursuant to an order dated December 21, 1992. The order was presented to the ALJ on January 20, 1993.

At hearing, a joint medical record exhibit was not ready for submission and instead a partial group of records were admitted into evidence after much argument as to what records were admissable. The ALJ gave the parties an extension of time post-hearing to submit the rest of the joint exhibit, but confusion ensued when additional records were submitted by the applicant without an indication as to whether the records were duplicative of records already admitted and without an indication as to whether the additional submissions had been agreed to by the carrier and the Employers Reinsurance Fund. Finally, per a conference call in early October 1992, the parties confirmed that all records that the Commission had at that time were to be considered the joint exhibit and the ALJ was informed at that time that there might be duplicates in the records that had been submitted. Rather than return the records to the parties to prepare an acceptable exhibit without duplicates, the ALJ decided to weed out the duplicates herself and after doing so, the ALJ admitted the medical record exhibit and marked it as Exhibit A-1. The records reflected a medical controversy regarding what portion of the applicant's impairment was related to the industrial incidents. Therefore, the ALJ determined that the matter would be referred to a medical panel for additional input.

The medical panel report was received at the Industrial Commission on December 16, 1992 and was distributed to the parties on December 17, 1992, with 15 days allowed for objections. Counsel for the applicant filed objections and/or argument regarding the report on January 4, 1993 and counsel for the defendant filed a response to this on January 8, 1993. Counsel for the applicant

filed a reply to the response and the Social Security Disability award information on January 20, 1993. The matter was considered ready for order on Jaunary 20, 1993.

FINDINGS OF FACT:

Although the first relevant industrial event that is involved in this claim did not occur until December 1987, the applicant had a significant non-industrial injury to both her lumbar and cervical spine in October of 1986 and did have back treatment and possibly neck treatment by a chiropractor prior to 1986. A good portion of the medical records submitted deal with the applicant's medical status prior to 1986 and the ALJ will briefly review this chronologically.

The applicant began having unexplained right upper quadrant pain as early as 1963 and she was finally hospitalized for this and associated back pain in 1973. Through that time, it was thought to be related to gastro-intestinal or gall bladder problems, but the testing during the hospitalization failed to confirm any problem in the stomach, kidneys, gall bladder or intestines. From 1972 forward, the applicant's regular family physician or physicians practiced at the Emery Medical Clinic in Castledale, Utah. The records from that clinic note that she was seen for fatigue/anemia/depression and allergic rhinitits in 1973. In 1974, she was seen for phlebitis and heart palpitations with chest pain. In 1975, ovarian cysts were diagnosed and in 1977 the applicant began to have excessive or unusual uterine bleeding. Additional assessment and testing in 1982 and 1983 confirmed bilateral ovarian cysts and continued prolonged bleeding. In 1977, the applicant began working for Utah Power and Light in a clerical/accounting position. In 1978, the applicant began to see a chiropractor at Castle Chiropractic Center in Castledale, Utah. The chiropractor's records note that the applicant first came in in September 1978 due to a traumatic lumbo-sacral strain. She was seen approximately 2 times per week in September and October of 1978. She again sought out chiropractic care in July of 1979 (once or twice per week) and in late August of 1979 (almost daily). In October of 1979, the applicant was seen at the Emery Medical Clinic for anxiety/depression and she was prescribed limbitrol.

The applicant was seen at Castle Chiropractic Center in late August 1980, almost daily, and again in late 1981 almost daily,

tapering off in October and November of 1981. in September of 1981, the Emery Medical Center diagnosed acute otitis media with perforation and the applicant was seen by Dr. G. Lund for a patch on the perforation. From April of 1982 through October of 1982, the applicant went to the chiropractor 2 to 4 times per month. In 1983, she was seen 2 to 4 times per month in February, June, July and December. In 1984, the applicant was seen by Dr. C. Null, a cardiologist, and he diagnosed a slight heart murmur. The applicant underwent breast reconstruction surgery in 1984. She saw the chiropractor from mid-May 1984 through mid-June 1984, 3 times per week, and then again in August of 1984, 2 times per week. In October of 1984, the applicant had a complete hysterectomy and oopherectomy at Holy Cross Hospital in Salt Lake City. At hearing, the applicant recalled that she did not see the chiropractor for back pain after her hysterectomy, but the records do indicate that the applicant saw the chiropractor almost daily in late August of 1986, tapering off in September in 1986. In October of 1986, she had her first significant cervical/lumbar injury.

On October 4, 1986, the applicant was in Albuquerque, New Mexico on vacation at the hot air balloon festival. She was riding in the back of a pick-up truck, on a gravel road, chasing a hot air balloon when the truck hit a dip in the road. The applicant stated that the truck was not going very fast and she was seated with her legs straight out in front of her leaning on the the side of the truck bed. As the truck hit the dip in the road, the applicant was bounced up off the bed of the truck and she came down hard, still in a seated position. The applicant described the effect on her as a heavy impact and a very severe jolt. That afternoon or evening, the applicant called a local chiropractor in Albuquerque and he treated the applicant on an emergency basis, also providing her with a back brace and a heel lift.

When the applicant returned to Utah, she went to see Dr. R. Sanders at the Castle Chiropractic Center on October 9, 1986. Dr. Sanders felt she had sustained multiple strains of the lumbar, thoracic and cervical spine. He began treating her with chiropractic treatments. The next doctor she saw for the Albuquerque injury was Dr. G. Momberger, a Salt Lake City orthopedist. She saw Dr. Momberger on October 28, 1986 and on an intake form it is noted that she had injured her neck, spine, low back, shoulders, knee and elbow. Responding to the cause of the problem, the form indicates that the applicant was picking up a suitcase and was bumped on August 16, 1986 (this incident was not discussed at hearing), with the truck incident occurring 6 weeks

later. The intake form also notes that BEFORE 1976 a Dr. Kazarian had recommended surgery and Dr. Lamb had recommended exercise only. There are no records from Dr. Kazarian or Dr. Lamb in the medical record exhibit. The same form indicates that the applicant's low back pain had begun in 1959. Dr. Momberger's notes indicate mid-thoracic pain and he referred the applicant to Dr. Ward at the University to determine if possibly she had a connective tissue disorder.

The next physician visit was on November 6, 1986, when the applicant was seen at the Emery Medical Clinic for depression. It was noted that the applicant had been followed weekly at a mental health clinic for the last 6 months for depression which was situational and related to various life set-backs. Desyrel was prescribed. The applicant continued with chiropractic treatments from Dr. Sanders through November 24, 1986, receiving an overall total of 14 treatments between October 9, 1986 and November 24, 1986. Dr. Sanders's records indicate that he referred the applicant to Dr. L. Gaufin, at the Utah Neurological Clinc in Provo, Utah, on November 24, 1986 and that Dr. Gaufin had a CT scan done. This may be an error, because there is no record of a CT scan in Dr. Gaufin's records or in the Utah Valley Regional Medical Center records, the hospital at which Dr. Gaufin normally gets his films. Dr. Gaufin did admit the applicant to Utah Valley Regional Medical Center on December 2, 1986 for a myelogram and Dr. Sanders may be referring to this film when he states a CT scan was performed. After reviewing the myleogram results, Dr. Gaufin's final diagnoses were: 1) acute and chronic lumbar radiculopathy secondary to centrally herniated L4-5 disc, 2) mild disc bulge L3-4, 3) cervical radiculopathy secondary to encroachment upon the nerve roots C4-5 and C5-6 bilaterally. Upon discharge, on Decmeber 4, 1986, Dr. Gaufin prescribed tylenol #3. The applicant was seen at Utah Valley Regional Medical Center several days later for what Dr. Gaufin describes as a post-myelogram headache with neck pain. The applicant was given dalmane and tylenol #3.

On January 5, 1987, Dr. L. Gaufin performed a semi-hemi laminotomy, formainotomy and nerve root decompression at L4-5 on the right at Utah Valley Regional Medical Center. In February of 1986, Dr. Gaufin wrote Dr. Sanders that the applicant had improved symptoms as a result of the surgery, but that she was still protective and cautious about her back and used an L5 corset for traveling. He noted that he would consider operating on her herniated cervical disc as soon as she stabilized from the lumbar surgery. On March 4, 1987, Dr. Gaufin wrote State Farm Insurance,

indicating that the October 4, 1986 truck accident had produced an acute vertical load on the applicant's spine and subsequent pressure on the discs which was totally compatible with the symptoms she later suffered and the herniated lumbar and cervical discs. He states in the letter that he did not operate on the L3-4 level because the applicant wanted to get as much wear out of that level as she could before proceeding with surgery. He noted that the applicant continued with neck, shoulder and arm symptoms and with headaches when she was in a vertical position. He noted that these symptoms were associated with the C4-5 and C5-6 discs and that he had scheduled her for neck surgery. The applicant was admitted to Utah Valley Regional Medical Center on March 9, 1987 and on March 10, 1987, Dr. Gaufin performed an anterior cervical disectomy with nerve root decompression and interbody fusion C4-5 and C5-6.

The applicant recuperated from March of 1987 until August 5, 1987 when Dr. Gaufin released her to return to work. During recuperation, Dr. Gaufin prescribed soma and tylenol #3 and the applicant went to the Emery Medical Clinic for estrogen supplements and allergy medications. The applicant testified that she had difficulty the first couple weeks back at work, but then got better and had no problems doing her work duties. Upon releasing the applicant to return to work, Dr. Gaufin recommended that she follow-up with her family physician for any medication refills she might need. There are almost no doctor visits except for those associated with medication refills at Emery Medical Clinic from the date of release (August 5, 1987) until December 14, 1987 when the applicant saw Dr. C. Null, a cardiologist, for lab tests. Apparently, the applicant was concerned with fatigue or low energy and Dr. Null confirmed with her that her test results were normal and that he believed her energy level was being effected by her recent surgeries and illnesses and that she should take vitamins.

It was during this same month, December 1987, that the applicant had the first of her industrial injuries. The applicant stated that she was at work and that she was wearing a long skirt with a slippery slip underneath it. As she went to sit on her chair, that had rollers on the legs, she caught just the edge of the chair seat and then the chair rolled back and away from her as she slid off the end of the seat. She apparently fell to the floor on her buttocks and had resulting back pain and right leg pain with muscle spasms. However, she had no doctor visits associated with this incident. She did get a refill of soma on December 29, 1987 at Emery Medical Center, but there are no actual examinations or

treatments for this injury. The applicant also missed no work time and there is no Employers First Report of Work Injury for this incident.

The applicant continued to work and was able to return to most all activities after the 1987 surgeries. She stated that she did avoid very jarring type activities, like aerobics and 3-wheelers per Dr. Gaufin's instructions. She did all her housework and she could drive, but she did avoid mowing the lawn per her testimony. She had only 4 or 5 visits or calls to Emery Medical Center from December of 1987 until August of 1988 and those were for prescription refills, only one of which was for soma. On August 15, 1988, the applicant had her second industrial incident. She was working quickly as she was filling in for several other workers that were off work at the time. She was doing Carma O'Brien's work for her and had to get into one of her file drawers. The relevant drawer was the bottom drawer of a file cabinet and was the largest drawer in the cabinet. The drawer was filled with paper and books, but the applicant did not know this. She was bending over and pulling on the drawer handle, which was about a foot off the floor, with her right hand, when the drawer partially opened and then stopped abruptly like it was stuck. The applicant stated that she felt something give in the middle of her back and her neck, shoulder and right arm felt wrenched. She also stated that she felt her neck pop or give way, but that she was more concerned at the time regarding her low back. She stated that there was no one at work to fill in for her, so she remained at work the remainder of the shift. She stated she continued to work in pain and discomfort after the incident and just tried to ignore "it." She testified that she took pain medications and muscle relaxers daily and would go straight to bed after getting off work.

Once again, there are no immediate doctor visits associated with this injury. The applicant testified at hearing that she did not want to see a doctor because she was afraid to find out that she had made her condition worse once again. The nearest-in-time medical record is a refill of estrogen at Emery Medical Center on August 30, 1988. The next doctor visit, on September 29, 1988, relates to the need for mammography and the fact that the applicant wanted her cholesterol checked. The office note for this visit does mention that the applicant had reinjured her neck "the other day" and needed a soma refill. Fioricet was prescribed on September 30, 1988. The first mention in the records of the December 1987 injury and the August 15, 1988 injury is in Dr.

Gaufin's office note dated October 3, 1988. In that note, he refers to the sliding-off-the-chair incident (he indicates this was in October of 1987 as opposed to December 1987) and the August 15, 1988 injury opening a heavy file drawer. The first incident he notes gradually resolved, but he noted that the applicant continued to have pain in the neck, shoulders and arms and numbness in the first, second and third digits of both hands (right greater than left) related to the August 15, 1988 incident. Some pain in the lumbar area was also noted. Dr. Gaufin wanted to rule out a recurrent disc herniation in the cervical spine, and carpal tunnel and thus he referred the applicant for an MRI and nerve conduction velocity tests and an EMG of the right upper extremity. On October 7, 1988, that applicant had an MRI of both the cervical and lumbar spine. The cervical film was read to show a stable fusion at C4-5 and C5-6, but degenerative disc disease at C6-7, producing a bar-type defect obliterating the thecal sac and impinging the nerve roots bilaterally, right greater than left. The lumbar film was read to show no evidence of recurrent disc injury, with a mild bulge at L5-S1 which did not significantly impinge on the nerve root or thecal sac. The nerve tests done at Western Neurological Associates on October 7, 1988 were read as normal by Dr. J. Andrews.

The applicant got refills of soma and tylenol #3 at Emery Medical Center on November 19, 1988. On November 23, 1988, Dr. Gaufin wrote Dr. Kotrady at Emery Medical Center indicating that he did not recommend surgery at that time for either the neck or back. He stated that he felt the applicant's 2 industrial injuries (December 1987 and August 15, 1988) had agrravated a pre-existing mild degenerative change at C6-7 and had created a mild bulge at L5-S1. He noted that the applicant might need surgery in the future, but for the time being he recommended anti-inflammatory medication, muscle relaxants and physical therapy as needed. In December of 1988, the applicant got refills of fioricet, tylenol #3 and lomatil. In January 1989, she was referred for physical therapy, which she attended 5 times between January 19, 1989 and February 9, 1989. In March of 1989, the applicant got refills of fioricet and seldane and there is an Emery Medical Center office note dated April 13, 1989 that indicates that the physical therapy had helped, but that the applicant wanted a soft cervical collar and a lumbar support. It was also noted that the physical therapist had recommended a TENS unit and the applicant was fitted for one in May of 1989. At hearing, the applicant testified that the physical therapy made her feel sicker. She indicated that the TENS unit helped sometimes. Although she continued to work, the applicant stated that she had her daughter do her housework for

her. She felt that she could not engage in her hobby of cake decorating and recalls needing to lay down in order to have her nails done, as this takes 2 hours. She stated that she tried to strengthen her back by walking while wearing her neck brace and that she tried to adjust her computer screen at work to make it more comfortable for her. She also indicated that she needed to lay down periodically at work.

Beginning in mid-May 1989, the applicant began to see an acupuncturist, Kris Ahshi. Based on the brief handwritten notes of the acupuncturist, the visits were not primarily for the neck or back (these were mentioned in the notes for just one visit), but rather were for a host of other non-industrial problems including fatigue, bloating/edema/water retention, sinus headaches, ear pain and constipation. She had 6 or 7 treatments per month from June 1989 through September of 1989 (in July only one treatment) with almost double that number of visits in October of 1989. During that period, in addition to her acupuncture treatments, the applicant was seen for various things at the Emery Medical Center including assessment for hypothyroidism in June 1989 (unconfirmed), for refills of tylenol #3, fioricet and soma in July 1989, for fioricet and naprosyn in September 1989 and for fioricet in October 1989, and for cholesterol lab tests in September 1989. In November of 1989, she was seen at Emery Medical Center for neck pain and right arm pain and it was noted that she had been using a neck brace for 2 months. It was recommended that she continue using the brace and going to acupuncture. The 4 visits to the acupuncturist in November 1989 are accompanied by notes indicating treatment for cervical pain, tingling and numbness. The applicant got refills of fioricet, naprosyn and soma on November 20, 1989 at Emery Medical Center.

On Decmeber 1, 1989, the applicant was seen at the Salt Lake Clinic by some physician for 1) hot flashes, 2) headaches, 3) fatigue, 4) allergies and 5) left upper chest pain. The physician noted that he would take some tests and he recommended that the applicant cut her premarin intake in half and that she quit taking provera altogether. From December 1989 through June of 1990, the applicant went to the acupuncturist only twice (once in March 1990 and once in June 1990) and apparently got prescription refills only at Emery Medical Center. Prescription refills included zovirax, fioricet (6 times), tylenol #3, naldicon, estrogen, soma (2 times), naprosyn, amitriptyline and prozac. The applicant testified that she actually worked overtime from January of 1990 through April of 1990 as another employee failed to return from maternity leave.

She indicated that this extra effort caused her to take more medication and to use her neck brace again so that she could keep up with the work. In May of 1990, a visit to Emery Medical Center notes pain down the right arm with numbness in the right digits, constant headache, and pain in the right leg with parasthesias in the toes after walking. Her visit to the acupuncturist in June of 1990 was for leg swelling and pain. On July 2, 1990, Dr. Kotrady of the Emery Medical Center wrote Dr. Gaufin, recommending that the applicant be reevaluated by Gaufin. In that letter, he notes that the applicant had persisting neck pain and that at one point she had become dependent on fioricet, soma and tylenol #3. He notes that she had been intolerant to prozac and amitriptyline and that he recommended a pain clinic if surgery was not recommended. He noted that he felt there was an emotional stress component that was blocking any successful treatment.

On July 9, 1990, just one week after Dr. Kotrady sent his letter to Dr. Gaufin, the applicant had her final industrial incident. The applicant stated at hearing that she was seated at her desk and merely turned her head with resultant neck spasm and symptoms on down her spine. It is somewhat unclear what exactly happened at work after she turned her head. There are some references in the medical records regarding the applicant collapsing on this date, but it is unclear whether she did any more than just lay down. She did go to the Emery Medical Center on the same day and a cervical spine X-ray was done, which showed the prior fusion and the C6-7 degeneration. An acute strain was diagnosed and soma and lortab were prescribed. Several days later she was referred to physical therapy, but the applicant called to tell the therapist she was to wait with the physical therapy until she saw Dr. Gaufin per Gaufin's instructions. On August 6, 1990, the applicant went to see family practitioner, Dr. S. Potter, in Price, Utah for hot flushes and headaches. He recommended a trial of prozac and some lab tests. Apparently, she thereafter made Dr. Potter her family doctor, but through the end of 1990 she continued to get prescription refills at Emery Medical Center for both her spinal problems (fioricet, soma, naprosyn, tyleonl #3) and for other things like anti-depressants (prozac and provera).

The applicant had a repeat cervical MRI done at Utah Valley Regional Medical Center on August 9, 1990 per Dr. Gaufin's referral. This was read to show no major changes since the one done on October 7, 1988. Dr. Gaufin saw her on August 15, 1990 and he noted that she continued to have chronic neck, shoulder and arm pain, with the pain being better when she was laying down and worse

when she was sitting at work. He noted that she continued to use the neck collar and his impression was acute chronic cervical radiculopathy secondary to spondylosis and protrusion of the disc at C6-7 bilaterally. He recommended surgery to decompress the nerve roots, but he noted that the applicant would need to be very careful in the future due to the propensity of deterioration of the discs caused by stress on the joints due to a 3-level fusion. His office note for October 7, 1988 indicates that the applicant would consider whether to have the additional surgery. Dr. Gaufin's letter to the carrier dated October 1, 1990 indicates that the applicant opted to avoid surgery and he therefore recommended: 1) avoiding jolting or jarring the neck, 2) use of a soft cervical collar, 3) cervical traction taught by a physical therapist and 4) anti-inflammatory medication and muscle relaxants with avoidance of narcotics.

In December 1990, Dr. Taylor at the Emery Medical Center wrote Dr. Gaufin requesting that he "do a disabilty determination" on the applicant as he believed the applicant would not be a dependable future employee. In response to this, the applicant saw Dr. Gaufin again on January 9, 1991 and Dr. Gaufin wrote Dr. Taylor a letter indicating that the applicant was at that time in such intense pain that she could not tolerate sitting in a chair in front of a table or a desk with her head flexed for 8 hours. He noted that her care options were surgery or conservative care, but that nothing was going to totally "get rid" of the pain. He noted that there was a general reduced success rate for 3rd surgeries and that the applicant would experience a continued wearing out process with age. He states in the letter that there would be a point at which surgery would not help. He found that the applicant continued to be termporarily totally disabled and that she would continue to use traction and see if she got her better enough to return to work. In January 1991, Dr. Taylor again wrote Dr. Gaufin asking him to rate the applicant. The applicant applied for Social Security Disability on January 28, 1991 and got refills of prozac, tylenol #3, soma, fioricet and naprosyn at the Emery Medical Center on January 31, 1991. Dr. Gaufin saw the applicant for the last time on March 18, 1991 when he rated her as having a 33% whole person impairment due to her industrial injuries, a combined rating of 20% lumbar and 16% cervical impairment. Not included in his rating was a 7% whole person rating for the neck and 8% for the lumbar spine due to the surgeries in 1987.

On April 29, 1991, Dr. P. Harris performed an examination of the applicant at the request of the carrier. He noted that the

applicant's two major complaints were: 1) constant neck pain with numbness and tingling made worse by sitting, standing in one spot and walking and made better by laying down with pillows under the neck, pain medications and muscle relaxers and 2) constant back pain from the mid-back to the low back radiating down her leg to her toe, better when she was laying down, walking or taking medication and generally more tolerable than the neck pain. He found that the applicant was medically stable and that surgery was advisable only if muscle atrophy occurred, muscle weakness became progressive or a free fragment was discovered. He found surgery was not advisable if the applicant merely had progressive pain symptoms. He found that the applicant had a combined total impairment from both the lumbar and cervical spine of 34%. He breaks this rating down, but his breakdown is a little confusing. Nonetheless it does appear that he feels that the vast majority of the rating was caused by the 1986 injury and ensuing 1987 surgeries.

In June and July 1991, the applicant saw Dr. S. Potter for depression and headaches and in July of 1991 the applicant returned to Dr. C. Null for increasing symptoms of precordial pressure, aching and tightness seeming to occur with activity. His diagnoses were: 1) mitral valve prolapse syndrome, 2) anginal syndrome, 3) intermittent episodes of arterial hypertension in the past, 4) prior spine injuries and 5) prior hysterectomy. Dr. Null noted that the applicant needed to get her cholesterol level down. The applicant saw Dr. J. Heiner in August 1991, apparently to get a second opinion regarding her neck and low back symptoms. His office note from this visit makes some observations, but there are no real conclusions stated in the note. He did take lumbar and cervical X-rays. Dr. Potter referred the applicant for acupuncture again in September of 1991 and the applicant had 5 treatments in a 2-month period from mid-September 1991 through mid-November 1991. On October 25, 1991, Social Security issued its initial decision denying the applicant disability benefits. The order notes that it was determined that the applicant could work an 8-hour day with normal breaks.

On November 7, 1991, the applicant saw Dr. S. Potter and he noted a new symptom. The applicant was having difficulty closing her hands. He referred the applicant for a rheumatoid factor lab test and his November 21, 1991 office note inddicates that this came back negative. He prescribed fioricet, physical therapy and a nerve conduction velocity test. The applicant had 10 acupuncture treatments from November 29, 1991 through December 27, 1991. On

December 20, 1991 Dr. J. Watkins, a nerurologist, wrote Dr. L. Gaufin indicating that he had seen the applicant for a tingling sensation in both hands and in the right arm along with intermittent loss of grip and tingling in front of her left ear which all began as of July 9, 1990. Numbness in the first 3 digits of the hands was also reported along with occasional drooling from the right side of the mouth. Dr. Watkins recommended nerve conduction velocity tests, EMGs of both upper extremities and an MRI of the brain. He wrote Dr. Gaufin on January 22, 1992 that these tests came back normal. Dr. Potter refilled the applicant's fioricet, tylenol #3, feldene, prozac and soma in January of 1992. On February 6, 1992, Dr. Potter also prescribed desyrel for neck symptoms and emotional stress and he informed the applicant's attorney that the desyrel was related to her industrial injuries. On March 1, 1992, he wrote the applicant's attorney and notified him that the medications that he was refilling (prozac, feldene, tylenol #3, fioricet and naprosyn) were all necessary due to the applicant's industrial injuries.

On March 5, 1992, Dr. Watkins wrote Dr. Gaufin and noted that the applicant had also developed dizzy symptoms and that she had gone off all medications and was trying meclizine for the dizziness. On March 30, 1992, Delvin McFarlane, LCSW, wrote a letter to-whom-it-may concern noting that he had seen the applicant 10 times in counseling and that the applicant had experienced some improvement as a result, but continued to grieve over the loss of her job and health. He concluded that it was difficult to accomplish much in therapy until the issue regarding her Social Security Disability was settled. He stated that he could see no way that she would be able to return to work and he recommended a speedy disability retirement. On March 31, 1992, a functional capacity evaluation was done through Carbon Emery Physical Therapy/Alta Health Services and this resulted in a classification for the applicant of light/sedentary work. It was noted that the applicant did not have good control of her pain and that she was limited by this and her fear of reinjury.

On April 6, 1992, the applicant saw Dr. J. Matthews who diagnosed her as having fibromyalgia syndrome and inflammatory polyarthritis. He noted that he wanted to rule out multiple sclerosis, lyme disease and hypothryroidism. He referred the applicant for lab tests and he did X-rays of her hands. He gave he an injection of adlone and prescribed cyclobenzodrine. Dr. Potter saw the applicant again on May 19, 1992 and he noted hand pain and leg swelling and he noted a possible diagnosis of fibromyacitis and

fatigue. He prescribed amitriptylline. The applicant was seen in the emergency room of Castleview Hospital on May 31, 1992 for neck and back pain and she was given an injection of demerol/phenergan and was sent home with percocet. Dr. Matthews's office note for June 1, 1992 adds two other diagnoses: hypothryroidism and chronic pain. He prescribed synthroid in addition to the cyclobenzodrine and indicated he would recheck her in 3 months. On June 29, 1992, the applicant requested a hearing with Social Security in order to reassess her entitlement to disability benefits.

There is a Career Guidcance Center report dated June 15, 1992 which concludes that there are jobs available for which the applicant is trained, but that she may have difficulty finding an employer willing to make the accommodations that are necessary in order for her to tolerate the workplace. The applicant has been receiving long term disability benefits since shortly after the July 9, 1990 incident but it is unclear in what amount and how long the benefits will continue. As of October of 1992, the Social Security Disability litigation was still in progress with no final result made known to the ALJ.

The applicant testified that since the July 9, 1990 incident, she was reduced to even less activity than she performed after the August 15, 1988 accident. She characterized her activity level as "totally down." She stated that she had a hard time even walking and could do no housework. She stated that she wore her neck brace for traveling and when she was unable to lay down. She stated that she was unable to drive for one year as she could not turn her head. At the time of the hearing, the applicant stated that she had constant pain in her neck (she wore her cervical collar at the hearing) and that she had reduced range of motion in the neck due to pain when she tried to turn her head. She stated that she had to lay still in the morning for a couple of hours before she could move her head. She stated that she no longer walks to help her back pain because this jars her neck. She stated that she can sit or stand for only 30 minutes at a time before the pain gets bad and then she needs to lay back, put her legs up or use her neck brace. She stated that it is painful to have her neck bent over looking at her desk or keyboard.

With respect to education and work experience, the applicant stated that she graduated from South Emery Highschool in Ferron, Utah and had only typing classes thereafter. She stated that she worked for 20 years, initially as a retail sales clerk in a women's

apparel store and later in several accounting/clerical positions. She feels that her limited ability to sit with her neck bent over a desk or keyboard prevents her from returning to clerical/accounting work and she feels that she can no longer do the bending, lifting, reaching and work on her feet that is required in a retail sales clerk position.

The medical panel consisted of Chairman, Dr. Madison Thomas, a neurologist and panel member Dr. B. Holbrook, an orthopedist. Their report was received at the Commission on December 16, 1992. The panel report concludes that there is a causal connection between the applicant's symptoms and the three industrial injuries at issue as well as a connection between her symptoms and pre-existing conditions or injuries. The panel is not specific about what symptoms it refers to, but the panel specifically talks about neck symptoms with radiation and problems in the right upper extremity and low back symptoms radiating into the right lower extremity. The panel found that the applicant's December 1987 work injury and the August 15, 1988 work injury did not result in any temporary total disability, with the July 9, 1990 work injury resulting in 3 or 4 weeks of temporary disability. With respect to impairment, the panel apportioned the applicant's impairment as follows:

	prior to 1986	10-4-86	12-87	8-15-88	7-9-90
cervical spine-17%	1.70%	11.90%	0.85%	2.55%	0.00%
lumbar spine-14%	3.50%	9.80%	0.42%	0.28%	0.00%
hypothy-roidism	5.00%	0.00%	0.00%	0.00%	0.00%
TOTAL	10.20%	21.70%	1.27%	2.83%	0.00%

The panel concluded that the treatment that the applicant has had was attributable to the accidents in the proportion represented by the impairment percentages and that the applicant's psychological status (depression with pre-existing personality disorder) was the result of multiple non-industrial factors.

On January 4, 1993, the ALJ received objections/argument from counsel for the applicant. In that filing, counsel objects to the panel's finding that no temporary total disability was attributable to the 1988 accident and that only 3 weeks of temporary total disability was attibutable to the 1990 accident. Counsel cites the indications of inability to return to work made by Dr. Gaufin and Delvin McFarlane, LCSW, in 1991 and 1992 as support for this objection. Counsel also notes that the panel did attribute some impairment to the 1987 and 1988 injuries and suggests that temporary disability should be proportional to the impairment noted by the panel. Counsel also argues that the panel should have attributed at least some of the applicant's depression to the industrial injuries since the social disruption that is cited as part of the cause of the depression resulted due to the applicant's loss of her job. Counsel for the defendants filed a response to these objections on January 8, 1993 pointing out that the July 9, 1990 injury is non-compensable as a result of the Allen case and since the applicant discontinued work due to this non-compensable incident, any depression resulting therefrom is also non-compensable.

On January 20, 1993, counsel for the applicant filed a reply to the response filed by counsel for the defendants. That reply indicates that the applicant is no longer contending that the July 9, 1990 injury is a separate compensable accident, but rather just the date when the applicant discontinued work as a result of injuries incurred in the 1987 and 1988 accidents. Attahced to the reply of counsel for the applicant is the December 21, 1992 award of Social Security Disability benefits. The decision notes that the applicant was found to be first disabled as of July 9, 1990, when she discontinued her work with Utah Power and Light. The findings of the ALJ who issued the decision cite the following impairments as the impairments that were relevant to the award of disability benefits:

> [A] history of lumbar disk surgery in January 1987, and cervical disk surgery in March 1987; post traumatic right, greater than left hand numbness with decreased grip and intermittent hand pain; fibromyalgia syndrome; inflammatory polyarthritis; polypharmacy; hypothyroidism; degenerative joint disease; degenerative disc disease; depression; and passive dependent personality disorder.

CONCLUSIONS OF LAW:

Adoption of Medical Panel Report:

The ALJ adopts the medical panel report to resolve the issues of causation and impairment in this matter. The panel alone has had access to all the applicant's medical records and thus the panel report is the only expert medical evidence in this case that is based on a complete medical history, as well as the applicant's hearing testimony. Although some of the applicant's medical care providers have pointed to the applicant's back and neck problems and her loss of her job as causes of her current disability, none have indicated clearly that the industrial injuries are the sole cause of her back and neck problems and the loss of her job. Therefore, there is no medical evidence that specifically refutes the panel's findings. As it is the best founded and most complete medical analysis in this case and as it is not specifically refuted by any other evidence, the ALJ adopts the medical panel conclusions as her own.

Compensability/Relevancy of the 3 Industrial Accidents:

The applicant did not file an application for hearing regarding the December 1987 industrial accident. Technically, this means that this accident is not part of the litigation that has gone forward in this case. The applicant missed no time from work as a result of this injury and saw no doctor specifically for this injury. The panel found a .85 % whole person cervical impairment and a .42% whole person low back impairment, or less than 2% whole person impairment, resulting from this injury. Clearly, it is not a significant injury and the applicant has not claimed it as having caused her permanent total disability. As such, the ALJ will consider the injury irrelevant for purposes of analyzing the permanent total disability claim.

The 1990 injury must be considered non-compensable. Per the medical panel report, the applicant clearly had significant permanent impairment to her cervical and lumbar spine at the time of this injury. Therefore, per the legal causation requirements outlined in the case Allen v. Industrial Commission, 729 P.2d 15

(Utah 1986), in order for the 1990 injury to be compensable, the applicant must be able to show that the July 9, 1990 injury was incurred pursuant to exertion greater than what is expended in non-employment life by individuals in the latter part of the 20th century. Since the description of the accident amounts to merely turning her head, the injury is not a separate compensable industrial accident. In addition, the panel attributed no impairment whatsoever to this incident. However, the ALJ should note that the applicant appears to now indicate that she is not claiming the July 9, 1990 incident as a separate compensable accident (per counsel for the applicant's January 12, 1993 letter to the ALJ), but rather that it is merely the date when she discontinued working due to her earlier industrial accidents. In essence, the applicant has withdrawn her claim that the July 9, 1990 incident is the cause of her permanent total disability. As such, the ALJ will not consider the July 9, 1990 incident in analyzing the applicant's claim for permanent total disability.

Based on the foregoing two paragraphs, only the August 15, 1988 accident is left as a possible industrial cause of the applicant's claimed permanent total disability. There has been no argument by the carrier that this incident was not a compensable industrial accident and thus the ALJ finds that this case boils down to a determination as to whether the August 15, 1988 compensable industrial injury is the cause of the applicant's current permanent total disability.

The Cause of the Applicant's Permanent Total Disability:

In order to be entitled to permanent total disability benefits, the applicant must be able to show that the industrial injury at issue actually caused the permanent total disability. Hodges v. Western Piling and Sheeting Co., 717 P.2d 713 (Utah 1986), Large v. Industrial Commission, 758 P.2d 954 (Utah App. 1988). The applicant's testimony, taken by itself, states that she recovered, returned to work and to most activities after her 1986 non-industrial injury and her two 1987 surgeries that followed. The applicant testified that after the August 15, 1988 industrial injury, she became considerably worse and was forced to work in pain with the assistance of medication. She indicated that she needed to lay down periodically during the day, and especially after work. Per the applicant, she needed help with her housework and needed to use a neck brace in order to walk for exercise. All of these things the applicant attributes to the effects of the

August 15, 1988 injury, as she was not experiencing these limitations just prior to the August 15, 1988 injury. In addition, the applicant claims that her limitations actually became more severe after the July 9, 1990 incident where she turned her head at work. The applicant's testimony that she was worse after the August 15, 1988 injury is supported in the medical records by an indication of increase medication usage after that injury. Also, the records suggest increased complaints of neck and arm symptoms in late 1988 and in 1989.

Looking at just the applicant's testimony, there is certainly an argument that the applicant's disabling symptoms gradually increased after the August 15, 1988 injury, thus strongly suggesting that the August 15, 1988 injury was the cause of her eventual complete disability beginning in July of 1990. However, there is alot of other evidence that leads one to the conclusion that the August 15, 1988 injury only minimally contributed to the applicant's overall disability. First, following the 1986 non-industrial injury at the balloon show in New Mexico, the applicant had two separate surgeries on her spine and was off work for a total of 7 to 8 months. In contrast, neither the 1987 nor the 1988 injury resulted in any immediate need for medical care and both involved no lost work time. No new objective findings on the applicant's X-rays were noted as a result of these two injuries. Also, the applicant was working overtime as late as 1990. The obvious conclusion from this comparison is that the 1986 non-industrial injury was much more significant medically than were the 1987 and 1988 industrial injuries. The minimal significance of the two industrial injuries is also supported by the medical panel impairment ratings, which attribute 80% of the applicant's neck impairment and 95% of the applicant's low back impairment to causes other than the industrial injuries.

Secondly, the medical records reflect a number of non-industrial medical problems that the applicant was experiencing in 1988, 1989 and 1990. These other problems, some of which required significant treatment, could have affected the applicant's ability and motivation to continue working. The applicant saw the acupuncturist, Dr. Kotrady and Dr. Potter for fagtiue, bloating, sinus headaches, ear problems, hot flushes, drug dependency and high cholesterol. In addition, Dr. Matthews diagnosed fibromyalgia, polyarthritis and hypothroidism in 1992 and he did not mention that any of these were related to the applicant's industrial injuries. Finally, the applicant was treated sporadically both before and after the industrial injuries for

depression/anxiety. Certainly, this condition must effect the applicant's motivation to continue working. There is no medical opinion that this problem is solely caused by the industrial injuries. The medical panel found that the applicant may need psychiatric care at this point, but that this is the result of multiple non-industrial factors.

Lastly, there is the Social Security Disability decision to consider. This decision lists 10 separate medical problems that contribute to the applicant's disability status (see quote in Findings of Fact). Four of the problems are clearly unrelated to the industrial injuries (the 1987 surgeries, hypothyroidism, depression and passive dependent personality disorder). There is a possiblity that the industrial injuries may have contributed in some degree to the remaining 6 problems listed, but there is no medical evidence that in fact this is the case. The medical records simply do not resolve what has caused or even aggravated the hand problems, the fibromyalgia, the polyarthritis, the polypharmacy, the degenerative joint disease or the degenerative disc disease. Even if one presumed that all of these conditions were aggravated by the industrial injuries, the medical panel report indicates that the medical care for these problems is attributed to the industrial injuries in the same percentages that is reflected by the impairment percentages. Once again, even making a presumption heavily in favor of the applicant, without any real supporting evidence for such a presumption, the result is that the industrial injuries contributed little to the need for medical care related to these problems.

The ALJ feels that there are cases where industrial injuries involving minimal impairment aggravate pre-existing medical problems sufficiently to support a finding that the injuries caused the permanent total disability. There is certainly some merit to the "straw-that-broke-the-camel's-back" theory. However, there needs to be more than just the applicant's testimony to support such a theory. If one can show that there was an need for increased immediate medical care or a clear period of disability and inability to work that followed the industrial injury, then the actual impairment percentage attributed to the industrial injury takes on less significance. In this case, as discussed above, those other factors are not present so as to allow the ALJ to discount the minimal impairment that the industrial injury or injuries caused. In addition, the applicant had significant pre-existing impairment in the same areas of the body that the applicant currently indicates are the source of her disaiblity and

there are many non-industrial injuries that appear to be influencing her overall disability. The ALJ finds that the preponderance of the evidence does not support a finding that the August 15, 1988 injury is the cause of her current permanent total disability.

The Objections to the Medical Panel Report:

The applicant's attorney objects to the panel's finding that no temporary total disability (TTD) is attributable to the 1987 or 1988 injuries. Counsel suggests that the panel should have found TTD in proportion to the impairment rated by the panel for the industrial injuries. However, the ALJ believes the panel found no TTD related to these injuries simply because the facts of the case reflect that the applicant just kept working after both the 1987 and 1988 injuries. The panel felt there was only TTD of 3 or 4 weeks following the July 9, 1990 incident and the panel was unwilling to consider this as caused by the 1987 or 1988 injuries. There is certainly nothing inconsistent in stating that the 3 or 4 weeks of disability following the July 9, 1990 incident was caused by the July 9, 1990 incident. To the ALJ, the panel's findings related to the TTD are entirely consistent and logical. Finally, it is true that Dr. Gaufin and Delvin McFarlane felt the applicant was disabled in 1991 and 1992, but neither definitively states this was due to the only compensable injury at issue, the August 15, 1988 accident. As such, the panel's conclusions regarding the TTD are not refuted by either Dr. Gaufin or Delvin McFarlane.

Counsel for the applicant argues that some portion of the applicant's depression must be attributed to the applicant's August 15, 1988 industrial injury, because the panel admitted that social disruption caused by loss of her job was contributing to her depression. However, it has not been established that the applicant lost her job due to the August 15, 1988 industrial injury. She worked for nearly 2 years following that injury and thus there is not even a temporal inference that can be made with respect to the 1988 injury causing the discontinuance of work. The ALJ finds that the applicant may have stopped working due to the July 9, 1990 injury, but this is not clearly established as counsel for the defendants suggests in his response to the applicant's objections. More than likely, there are a number of reasons for the applicant's decision to stop working in July of 1990. As the applicant was being treated for depression as early as 1973, and as her cessation of work has not been clearly linked to the 1988

accident, the ALJ does not find inconsistent the panel's conclusion that the depression is the result on multiple non-industrial factors.

Concluding Remarks:

The ALJ makes no separate finding with respect to the applicant's ability to work at this point. It is unnecessary to rule on this issue since the ALJ finds that any disability that may exist is not attributable to the August 15, 1988 industrial accident. However, just as commentary, it does appear that the applicant is probably totally disabled due to multiple factors as noted in the Social Security decision. Because the ALJ feels sympathy for the applicant and the difficult time she has had, the ALJ wishes she could just accept the applicant's testimony and award benefits. Unfortunately, the ALJ feels she cannot ignore the other substantial evidence that does not support the applicant's theory of the cause of her disability. The ALJ considered awarding the applicant just the very minimal permanent partial impairment (PPI) that is supported by the medical panel report, but it appears that the carrier has paid alot more TTC (from July 10, 1990 through March 4, 1991) than is supported by the panel report and this completely offsets any PPI that would be payable.

ORDER:

IT IS THEREFORE ORDERED that the applicant's claim for permanent total disability benefits and any alternative claim for temporary total compensation or permanent impairment benefits associated with the industrial injuries of August 15, 1988 and July 9, 1990 is dismissed with prejudice.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

Barbara Elicerio
Administrative Law Judge

Certified by the Industrial Commission of Utah, Salt Lake City, Utah, this 4th day of February, 1993.
ATTEST:

Patricia O. Ashby
Commission Secretary

CERTIFICATE OF MAILING

I certify that on February 4th, 1993, a copy of the attached Findings of Fact, Conclusions of Law and Order, in the case of Claudia Cox, was mailed to the following persons at the following addresses, postage paid:

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INDUSTRIAL COMMISSION OF UTAH

By Wilma Burrows/nm
Wilma Burrows
Adjudication Division

00387

Appendix C:

Order Denying Motion for Review

INDUSTRIAL COMMISSION OF UTAH
SALT LAKE CITY, UTAH 84114-6600

CLAUDIA COX, Applicant, v. UTAH POWER & LIGHT, ENERGY MUTUAL INSURANCE and EMPLOYERS' REINSURANCE FUND, Respondents.	*	ORDER DENYING MOTION FOR REVIEW Case No. 92000255

The Industrial Commission of Utah (Commission) reviews the motion for review of respondent in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

The provisions of U.C.A. Sections 35-1-1 et. seq. are applicable in this case.

The order of the administrative law judge (ALJ) is presumed to be lawful and reasonable "until it is found otherwise in an action brought for that purpose, or until altered or revoked by the commission." U.C.A. Section 35-1-20 (1953).

The statutes further provide that:

> A substantial compliance with the requirements of this title [Title 35] shall be sufficient to give effect to the orders of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature.

U.C.A. Section 35-1-33 (1953).

The Commission has "the duty ... and ... full power, jurisdiction, and authority to ... administer and enforce all laws for the protection of life, health, safety, and welfare of employees," U.C.A. Section 35-1-16(1)(a)(1953), and to "consider and determine" the matters in issue, U.C.A. Section 35-1-24 (1953).

Additional evidence that the Commission has been granted discretion in its determinations is shown by U.C.A. Section 35-1-88 (1965) which provides:

> ...The commission may make its investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of

the Workmen's Compensation Act.

The preceding statute relates to matters at hearings, and shows the extent to which the legislature desired to provide the Commission with the necessary discretion to reach a decision. This statute also provides the authority for the Commission to deviate from common-law rules, statutory rules of evidence, technical or formal rules of procedure, unless provided for in the workers' compensation act, or unless otherwise adopted by Commission rules. Id.

Thus, the statutes expressly and impliedly give the Commission, commensurate with its statutory duty, broad authority and discretion to interpret, construe, consider, and determine the matters before it in the workers' compensation arena.

The applicant filed this motion for review challenging the ALJ's ruling that she failed to prove that her permanent total disability ("PTD") was caused by her industrial accident of August 15, 1988. The applicant argues that she is entitled to benefits because she showed a "medically demonstrable causal link" under Allen v. Industrial Commission, 729 P.2d 15, 27 (Utah 1986) between her August 15, 1988 industrial accident and her disability. The respondent asserts that Large v. Industrial Commission, 758 P.2d 954 (Ut. Ct. App. 1988) requires that a claimant "prove medically that his disability was caused by an industrial accident." Finally, the applicant asserts that under the odd-lot doctrine, she is entitled to PTD benefits.

In Allen v. Industrial Commission, the Utah Supreme Court held that a claimant for workers' compensation benefits who has a pre-existing condition must prove both legal and medical causation[1] before he is entitled to benefits. The Court discussed the causal connection required to sustain a claim for permanent total disability benefits in Hodges v. Western Piling & Sheeting Co., 717 P.2d 718 (Utah 1986). Hodges requires that a claimant for permanent total disability benefits prove that his disability was caused by an industrial accident. Id. at 721. The Utah Court of Appeals applied Allen and Hodges to sustain the commission's denial of benefits to a PTD claimant whose disability was determined to be the result of pre-existing conditions and not an industrial

---

[1] Legal causation requires a showing that the employment contributed something substantial to increase the risk he already faced in everyday life because of his pre-existing condition. Medical causation requires a showing that the disability is medically the result of an exertion or injury that occurred during work related activity. Allen v. Industrial Commission, 729 P.2d 15, 27 (Utah 1986).

accident. Large v. Industrial Commission, 758 P.2d 954 (Ut. Ct. App. 1988).

It is important to note that there is a distinction between the terms "impairment" and "disability." "Impairment" is a medical appraisal of the "nature and extent of the patient's illness or injury as it affects his personal efficiency in one or more of the activities of daily living." "Disability" is the worker's impairment of earning capacity. Northwest Carriers, Inc. v. Industrial Commission, 639 P.2d 138, 140, n. 3 (Utah 1981). A determination of whether a claimant is permanently and totally disabled is a question of fact. On review, an ALJ's determination of factual issues must be supported by substantial evidence in the record. Grace Drilling v. Board of Review, 776 P.2d 63 (Ut. Ct. App. 1989). We will review the record to determine whether there is substantial evidence in the record to support the ALJ's finding that the applicant did not become permanently and totally disabled as a result of her August 15, 1988 industrial injury.

Review of the medical records shows that the applicant first sought chiropractic care from Castle Chiropractic for lumbo-sacral strain in September 1978. She continued to see her chiropractor as needed through November 1991. In October 1986, the applicant was riding in the back of a pickup truck chasing a hot air balloon in Albuquerque, New Mexico, when the truck hit a dip in the road which caused her to bounce up off the bed of the truck and land hard on her buttocks in a seated position. She sought emergency chiropractic care that evening at Care More Chiropractic in Albuquerque, and was provided a back brace for her trip home to Utah.

Upon her return, the applicant was treated by Dr. R. Sanders at Castle Chiropractic Center. Dr. Sanders referred her to Dr. Gaufin at the Utah Neurological Clinic on November 24, 1986. Dr. Gaufin diagnosed acute and chronic lumbar radiculopathy secondary to a centrally herniated L4-5 disc, mild disc bulge L3-4, cervical radiculopathy secondary to encroachment upon the nerve roots at C4-5 and C5-6 bilaterally and prescribed pain medication. Dr. Gaufin performed a semi-hemi laminotomy, foraminotomy and nerve root decompression at L4-5 on the right at Utah Valley Regional Medical Center on January 5, 1987. He performed an anterior cervical discectomy with nerve root decompression and interbody fusion at C4-5 and C5-6 on March 10, 1987.

The applicant was released to return to work on August 5, 1987 and sought follow up care with her family physician at Emery Medical Clinic. The medical records show that the applicant saw her doctor primarily for medication refills during the period from August 5, 1987 to December 14, 1987.

Sometime during December 1987, the exact date is not noted in the record, the applicant suffered the first of three alleged industrial injuries. As she attempted to sit at her desk, her chair which was equipped with wheels, rolled away and she fell to the floor landing on her buttocks. The applicant sought no immediate medical care as a result of this fall, but did refill her prescription for Soma on December 29, 1987. The applicant missed no work and no Employer's First Report of Injury was filed for this incident. The application for a hearing alleged that the applicant suffered industrial accidents on August 15, 1988 and July 9, 1990. The ALJ considered the December 1987 injury irrelevant to the applicant's PTD claim.

A second industrial incident occurred on August 15, 1988. The applicant was doing work for one of her co-workers, Carma O'Brien, who was off that day. As the applicant attempted to open the bottom drawer of Ms. O'Brien's file cabinet, the drawer stuck and the applicant felt something give in the middle of her back, and her neck, shoulder and right arm felt wrenched. She completed her shift on August 15, 1988 and continued to work thereafter. The applicant testified that, following this accident, she took pain medications and muscle relaxants daily and went straight to bed after work. There were no immediate doctor's visits associated with the August 15, 1988 injury.

The first mention of the December 1987 and August 15, 1988 accidents in the medical records was in Dr. Gaufin's office note dated October 3, 1988. Dr. Gaufin referred the applicant for an MRI of her cervical and lumbar spine. The cervical films were read to show a stable fusion at C4-5 and C5-6, and degenerative disc disease at C6-7, producing a bar type defect obliterating the thecal sac and impinging on the nerve roots bilaterally, greater on the right than the left. The lumbar films showed no evidence of a recurrent disc injury, but a mild bulge not impinging on the nerve root or thecal sac was noted at L5-S1. Nerve conduction tests performed on October 7, 1988 were read as normal by Dr. J. Andrews at Western Neurological Associates. In a November 23, 1988 letter to Dr. Kotrady at Emery Medical Center, Dr. Gaufin opined that the applicant's industrial accidents had aggravated a pre-existing mild degenerative change at C6-7 and created a mild bulge at L5-S1. Conservative treatment was recommended.

The applicant continued to use pain medications and muscle relaxants. She also tried physical therapy and acupuncture for pain control. The applicant continued to work, although she testified that her daughter helped with housework and she was unable to engage in her hobby of cake decorating. However, the applicant worked overtime between January and April of 1990 after a co-worker failed to return from maternity leave. In May 1990, the applicant complained of pain down her right arm, numbness in her

right hand, constant headaches, and pain in the right leg with parasthesias in the toes after walking. Dr. Kotrady wrote Dr. Gaufin on July 2, 1990 recommending that the applicant be reevaluated by Gaufin. Kotrady stated that he would recommend a pain clinic if Gaufin determined that surgery was not the recommended course of treatment. Dr. Kotrady believed that there was an emotional stress component blocking successful treatment of the applicant's symptoms.

On July 9, 1990, the applicant suffered her final industrial incident. She was sitting at her desk and turned her head, bringing on muscle spasms in her neck and spine. The applicant went to the Emery Medical Center that day and a cervical X-ray was made which showed no changes from previous studies. An acute strain was diagnosed and Soma and Lortab were prescribed. Physical therapy was postponed until after the applicant saw Dr. Gaufin. An MRI was done on at Utah Valley Regional Medical Center on August 9, 1990. The MRI showed no major changes since the previous MRI performed on October 7, 1988. This incident is not a compensable industrial accident under Allen, because the applicant's employment did not contribute anything substantial to increase the risk she already faced in nonemployment life.

Dr. Gaufin examined the applicant on August 15, 1990. He opined that the applicant had acute chronic cervical radiculopathy secondary to spondylosis and protrusion of the disc at C6-7 bilaterally. He recommended surgery to decompress the nerve roots, but the applicant did not want surgery at that time. Dr. Gaufin recommended that the applicant avoid jolting or jarring the neck, use of a soft cervical collar, cervical traction taught by a physical therapist, and anti-inflammatory and muscle relaxants. In January 1991, Dr. Gaufin gave the applicant a 33% whole person impairment rating due to her industrial injuries.

On April 29, 1991 Dr. Harris examined the applicant upon the insurance carrier's request. He gave the applicant a 34% impairment rating, but apportioned the majority of the rating to 1986 nonindustrial injury and subsequent surgeries.

The applicant saw Dr. Potter for depression and headaches in June and July 1991. On October 25, 1991 the applicant's request for Social Security disability benefits was denied. The Social Security Administration determined in an order dated October 25, 1991, that the applicant could work an 8-hour day with normal breaks. The applicant saw Dr. Potter on November 7, 1991, and he noted that the applicant was having problems closing her hands. Dr. Watkins, a neurologist, saw the applicant on December 20, 1991. He ordered a nerve conduction velocity test, EMG's of both arms and a MRI of the brain, all of which were within normal limits. On March 5, 1992, Dr. Watkins reported that the applicant had

developed dizziness, had gone off all medications, and was taking meclizine for the dizziness.

A March 31, 1992 functional capacity evaluation at Carbon Emery Physical Therapy classified the applicant for light/sedentary work. The report noted that the applicant was not in control of her pain and was limited by her fear of reinjury. Dr. Matthews diagnosed the applicant with fibromyalgia syndrome and inflammatory polyarthritis on April 6, 1992. He also tested her for multiple sclerosis, lyme disease and hypothyroidism. He returned a diagnosis of hypothyroidism and chronic pain on June 1, 1992. Dr. Potter, on May 19, 1992, noted hand pain, leg swelling and diagnosed possible fibromyacitis and fatigue.

A Career Guidance Center report dated June 15, 1992 concluded that there were jobs available for which the applicant was trained, but that it might be difficult for the applicant to find an employer willing to accommodate her disabilities. The applicant is a high school graduate with a 20 year work history in retail sales, accounting and clerical positions. She believes that she can no longer perform these types of work due to her inability to sit and work for long periods at a desk or to bend, lift, reach and stand as required in retail sales.

The ALJ referred this matter to a medical panel for an apportionment of the applicant's impairment among several possible causes. The medical panel attributed 1.27 % of the applicant's permanent impairment to her December 1987 accident, 2.83% of the applicant's permanent impairment to her August 15, 1988 accident, and 33.17% to various pre-existing causes. No permanent impairment was attributed to the July 9, 1990 incident. The medical panel further concluded that the applicant's depression and pre-existing personality disorder were caused by non-industrial factors.

The applicant received Social Security disability benefits pursuant to a decision dated December 21, 1992. The decision stated that the following impairments were relevant to the award of disability benefits:

> [A] history of lumbar disc surgery in January 1987, and cervical disc surgery in March 1987; post traumatic right, greater than left, hand numbness with decreased grip and intermittent hand pain; fibromyalgia syndrome; inflammatory polyarthritis; polypharmacy; hypothyroidism; degenerative joint disease; degenerative disc disease; depression; and passive dependent personality disorder.

The Social Security Administration decision lists 10 separate

medical problems which contribute to the applicant's disability status. Four of those medical problems are clearly unrelated to the applicant's industrial injuries (the 1987 surgeries, hypothyroidism, depression and passive dependant personality disorder). The industrial injuries may have contributed to the other six conditions, but the medical evidence does not show a causal connection between the applicant's hand problems, fibromyalgia, polyarthritis, polypharmacy, degenerative joint disease, and degenerative disc disease and the applicant's industrial accident of August 15, 1988. The medical panel assigned 95% of the applicant's 14% lower back impairment and 80% of the applicant's 17% cervical spine impairment to the applicant's balloon chasing accident and other pre-existing impairments. The relatively small proportion of the applicant's impairment that was attributed to the industrial accident of August 15, 1988, is, in our view, insufficient to support a finding that the applicant's permanent total disability was caused by that industrial accident.

Therefore, the applicant has not proved by a preponderance of the evidence that her disability was caused by her industrial accident of August 15, 1988. Therefore, under Hodges and Large, she is not entitled to permanent total disability benefits. The applicant's claim for permanent total disability benefits under the odd-lot doctrine likewise fails due to the lack of a causal connection between the industrial accident and her permanent total disability. We therefore, find that the ALJ's finding that the applicant is not entitled to permanent total disability benefits is supported by substantial evidence in the record.

ORDER:

IT IS ORDERED that the Order of the administrative law judge dated February 4, 1993 is hereby affirmed.

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days from the date of this order, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16, and Couriers v. Dept. of Employment Security, 201 Ut. Adv. Rep. 79 (CA 12/04/92). The requesting party shall bear

all costs to prepare a transcript of the hearing for appeals purposes.

Stephen M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Colleen S. Colton
Commissioner

Certified this 22nd day of April 1993.
ATTEST:

Patricia O. Ashby
Commission Secretary

CERTIFICATE OF MAILING

I, Adell Butler-Mitchell, certify that I did mail by prepaid first class postage, except as noted below, a copy of the ORDER DENYING MOTION FOR REVIEW in the case of CLAUDIA COX, Case Number 92000255, on 29th day of April, 1993 to the following:

CLAUDIA COX
P O BOX 273
ORANGEVILLE, UTAH 84537

RINEHART PESHELL, ATTORNEY
7321 SOUTH STATE
MIDVALE UT 84047

ENERGY MUTUAL INSURANCE
P O BOX 27008
SALT LAKE CITY UT 84127-0008

ERIE V. BOORMAN, ATTORNEY
EMPLOYERS REINSURANCE FUND

EDWARD B. HAVAS
WILCOX, DEWSNUP & KING
2020 BENEFICIAL LIFE BUILDING
36 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

Adell Butler-Mitchell

Adell Butler-Mitchell
Paralegal
General Counsel's Office
Industrial Commission of Utah

09124

Appendix D:

Letter Dated March 9, 1993 from ALJ to Petitioner's Counsel

State of Utah

INDUSTRIAL COMMISSION OF UTAH
ADJUDICATION DIVISION

Michael O Leavitt
Governor

Stephen M Hadley
Chairman
Thomas R Carlson
Commissioner
Colleen S. Colton
Commissioner

Timothy C. Allen
Presiding Administrative Law Judge
160 East 300 South, 3rd Floor
P.O. Box 146615
Salt Lake City, Utah 84114-6615
(801) 530-6800
(801) 530-6804 (Fax)

March 9, 1993

EDWARD HAVAS
ATTORNEY
2020 BENEFICIAL LIFE TOWER
SALT LAKE CITY UT 84111

Re: Claudia Cox
Inj: 8-15-88
Emp: Utah Power & Light

Dear Mr. Havas:

I have received your Motion for Review for the above-referenced matter and I will not be altering my order based on the issues you raise in that Motion. There is no question that the industrial injury caused impairment, but the issue in this case is whether it caused her to become permanently totally disabled and there were many other non-industrial factors involved in her final decision to cease working. You indicate a number of times in your Motion that some of the Social Security diagnoses were PROBABLY caused by the industrial injury. I found only that there was a POSSIBILITY of this, but no medical evidence to suggest any more than this. Finally, I do not believe that the 1988 accident was the straw that broke the camel's back. The applicant worked for two years after the 1988 accident and had many non-industrial medical problems during this time.

BY A COPY OF THIS LETTER TO MR. PESHELL AND MR. BOORMAN, I AM NOTIFYING THEM THAT THEY HAVE 15 DAYS FROM THE DATE OF THIS LETTER TO RESPOND TO THE MOTION FOR REVIEW. AT THE EXPIRATION OF THAT TIME PERIOD, I WILL FORWARD THE MATTER ON TO THE COMMISSION FOR A FINAL RULING.

Barbara Elicerio
Administrative Law Judge

cc: Claudia Cox, P O Box 273, Orangeville, UT 84537
Rinehart Peshell, Attorney, 7321 South State, Midvale, UT 84047
Energy Mutual Insurance, P O Box 27008, SLC, UT 84127-0008
Erie Boorman, Attorney/Administrator, Employers Reinsurance Fund

00091

Appendix E:

Defendant's Memorandum of Points and Authorities in Opposition to Applicant's Motion for Review

Rinehart L. Peshell, 2573
FAIRBOURN & PESHELL
7321 South State Street
Midvale, UT 84047
(801) 255-3591

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF UTAH

----------ooOoo----------

CLAUDIA COX,	:	
	:	
Applicant,	:	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPLICANT'S MOTION FOR REVIEW
	:	
vs.	:	
	:	
UTAH POWER AND LIGHT/ ENERGY MUTUAL INSURANCE COMPANY, and EMPLOYERS REINSURANCE FUND,	:	CASE NO. 92000255
	:	
Defendants.	:	

Defendants Utah Power and Light and Energy Mutual Insurance Company, by and through their attorney Rinehart L. Peshell, hereby submit their Memorandum of Points and Authorities in Opposition to Applicant's Motion For Review.

FACTS

The following undisputed facts are essential in order to properly consider whether Applicant's Motion For Review should be granted.

1. Commencing in 1978 through August and September 1986, applicant was treated by a chiropractor for back pain. See Exhibit

"A" attached hereto, p. 1-2.

2. During that same period of time, Applicant was also treated for fatigue, anemia, depression, allergic rhinitis, phlebitis, heart palpitation with chest pain and underwent a complete hysterectomy. See Exhibit "A" p. 1-3

3. On October 4, 1986, Applicant was involved in a non-industrial accident which injured her back and eventually resulted in surgery on January 5, 1987, when a semi-hemi laminotomy, foraminotomy and nerve root decompression at L4-5 was performed. On March 9, 1987, Applicant underwent, as the result of the October 4, 1986 accident, an anterior cervical diskectomy with nerve root decompression and interbody fusion C4-5 and C5-6. See Exhibit "A," p. 4-6.

4. In December, 1987, applicant suffered her first industrial injury; but saw no doctors and missed no work time as a result of said accident. See Exhibit "A," p. 6-7.

5. On August 15, 1988, Applicant bent down to pull out a bottom drawer of a file cabinet. The file drawer which was filled with papers and books, stopped abruptly as it was being opened and something gave in the middle of applicant's back. See Exhibit "A," p. 7.

6. Thereafter, Applicant, although her condition seemed to worsen, continued to work and even worked overtime from January

1990 through April 1990. See Exhibit "A," p. 9.

7. On July 9, 1990, applicant turned her head while at work and suffered a resultant neck spasm and symptoms on down her spine. See Exhibit "A," p.10.

8. Said incident was found to be non-compensable. See Exhibit "A," p. 18.

9. After July 9, 1990, Applicant suffered a tingling sensation in both hands and in the right arm along with intermittent loss of grip, tingling in front of her left ear and numbness in the first 3 digits of the hand. See Exhibit "A,", p. 13.

10. On April 6, 1992, Applicant was diagnosed with fibromyalgia, fatigue, hypothyroidism and chronic pain. See Exhibit "A," p. 14.

11. Applicant was reduced to even less activity, as a result of the July 9, 1990 accident, than she performed after the August 15, 1988 accident. See Exhibit "A," p. 14.

12. Applicant was off work for seven to eight months as a result of the 1986 New Mexico accident and underwent two surgeries. No immediate medical care or lost work time resulted from either the 1987 or 1988 industrially-related accidents. See Exhibit "A," p. 19.

13. In 1988, 1989, and 1990, Applicant suffered from fatigue,

bloating, sinus headaches, ear problems, hot flashes, drug dependency, high cholesterol, fibromyalgia, hypothyroidism, depression and anxiety. See Exhibit "A," p. 19-20.

ARGUMENT

Applicant argues that she is entitled to permanent total disability award and compensation under the Workers Compensation Act if applicant's industrial injuries contributed to Applicant's whole person impairment rating and Applicant can show a "medically demonstrable causal link between her industrial accident and her permanent disability.".

In Large vs. Industrial Commission of Utah, the Supreme Court held:

> ... a claimant for permanent total disability benefits must prove medically that his disability was caused by an industrial accident. Large vs. Industrial Commission of Utah, 758 P2d 954, 957 (1988).

Cause means "to make happen." Webster's Encyclopedic Dictionary, 1990.

In the Large matter, Mr. Large had prior back problems and herniated lumbar disc surgery when he slipped and fell from a truck at work. Mr. Large's doctor stated that Mr. Large had difficulty in walking due to his weight and back problems. X-rays showed that Mr. Large had an old compression fracture. The Utah Supreme Court

in denying Mr. Large's claim held:

> We find substantial evidence in the record to support a finding that the 1985 injury was not the medical cause of Large's permanent total disability status and that Large's age, obesity, lack of transferable skills and prior back surgery resulted in his disability. Large, Infra p. 957.

In other words, the slipping from the truck at work did not make Mr. Large disabled.

In the matter presented before the Commission, there is no medical evidence, nor is there a medical opinion, that the August 15, 1988 incident caused Applicant's disability. The most that can be found are medical opinions that said accident contributed to Applicant's overall disability. Applicant continued to work after the August 15, 1988 accident and even worked overtime until April 1990. After the non-compensable incident of July 9, 1990, Applicant's condition was worse and she suffered greater limitations and could do less activity than after the August 15, 1988 incident. X-rays taken after the 1988 accident showed no appreciable change from those taken after the 1986 non-industrial accident.

In addition, Applicant, in 1990, was suffering from fatigue, bloating, sinus headaches, ear problems, hot flashes, drug dependency, high cholesterol, fibromyalgia, polyarthritis and hypothyroidism, depression and anxiety.

There are no medical opinions stating that any of the medical

problems above listed were significantly related to applicant's industrial injury, nor was there a medical opinion as to what actually caused applicant to become totally disabled.

In addition, Applicant has only a high school education and has worked only as a sales clerk and in accounting and clerical positions. Applicant testified that she was unable to perform these types of jobs any longer.

Applying the language of the Large case to this case, it can be said that there is substantial evidence in the record to support a finding that the August 15, 1988 injury was not the medical cause of Cox's permanent total disability status and that Cox's lack of transferable skills, prior back surgeries, and other medical problems not related to her industrial injury resulted in her disability.

Applicant has the burden of proof to show by a preponderance of the evidence that the medical cause of her disability was the August 15, 1988 accident. No such showing was made. In fact, the ALJ found that the August 15, 1988 accident was not the cause; but only a minor contributory factor leading to applicant's claimed permanent total disability.

CONCLUSION

Because of Applicant's numerous other medical non-industrial related problems from which Applicant was suffering in July 1990, and because there is no medical evidence that the August 15, 1988 industrial injury caused Applicant to become permanently totally disabled, applicant's Motion For Review should be denied.

DATED this 9th day of March, 1993.

FAIRBOURN & PESHELL

Rinehart L. Peshell
RINEHART L. PESHELL
Attorney for Defendants

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing this 9th day of March, 1993, to:

EDWARD B. HAVAS
WILCOX, DEWSNUP & KING
ATTORNEY FOR APPLICANT
2020 BENEFICIAL LIFE BUILDING
36 SOUTH STATE STREET
SALT LAKE CITY, UT 84111

ERIE V. BOORMAN
EMPLOYER'S REINSURANCE FUND
160 EAST 300 SOUTH, #300
SALT LAKE CITY, UT 84111

Rinehart L. Peshell

Appendix F:

Social Security Decision

(801)748-2127

NOTE TO PROCESSING CENTER
FURTHER ACTION NECESSARY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

Refer to : 528-74-9096

Claudia A. Cox
P.O. Box 273
Orangeville, UT 84537

NOTICE OF FAVORABLE DECISION - PLEASE READ CAREFULLY

This Decision Is Favorable To You

- Another office will process the decision. You will receive a notice from that office.

- Your local Social Security office or another office may ask you to give more information before you receive the notice. If so, please answer promptly.

- If you hear nothing about this decision for 60 days, please contact your local Social Security office.

If You Think the Decision is Wrong

- You have the right to appeal. You must file your appeal within 60 days from the date you receive this notice. (It will be presumed that you received the notice within 5 days after the date shown below, unless you show us that you did not receive it within the 5-day period.)

- When you appeal, you request the Appeals Council to review the decision. If the Appeals Council grants your request, it will review the entire record in your case. It will review those parts of the decision which you think are wrong. It will also review those parts which you think are correct and may make them unfavorable or less favorable to you. You will receive a new decision.

- You (or your representative) have to ask for the appeal in writing. You may sign a form HA-520, called "Request for Review by the Appeals Council," or write a letter.

- You may submit your appeal to your local Social Security office, a hearing office, or mail it directly to the Appeals Council, Office of Hearings and Appeals, P.O. Box 3200, Arlington, VA 22203.

The Appeals Council May Review the Decision on its Own Motion

- Within 60 days from the date shown below, the Appeals Council may review the decision on its own motion. This could change the decision.

- After the 60-day period, the Appeals Council may reopen and revise the decision in certain situations.

- The Appeals Council will notify you if it decides to review the decision on its own motion or to reopen and revise the decision.

Unless you request review or the Appeals Council reviews the decision on its own motion, you may not obtain a court review of your case (sections 205(g), 1631(c)(3) or 1869(b) of the Social Security Act).

This notice and the enclosed copy of decision mailed

December 21, 1992

cc:
Name and Address of Representative

Chon Kandaris
Utah Legal Services
23 S. Carbon Ave., Suite 4
Price, UT 84501

(801)637-3049
Replaces Form HA-L502-U7

NOTE TO PROCESSING CENTER
FURTHER ACTION NECESSARY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	CLAIM FOR
Claudia A. Cox	Period of Disability and Disability Insurance Benefits
(Claimant)	
	528-74-9096
(Wage Earner)	(Social Security Number)

PROCEDURAL HISTORY

This case is before the Administrative Law Judge (ALJ) on a request for hearing filed by the claimant, who is dissatisfied with the previous determinations finding that she is not disabled.

The claimant appeared and testified at the hearing, represented by Chon Kandaris, a non-attorney representative. At the request of the ALJ, G. Barrie Nielson appeared and testified as a vocational expert.

ISSUES

The issues in this case are whether the claimant is under a disability as defined by the Social Security Act and if so, when her disability commenced, the duration of the disability, and whether the insured status requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

EVALUATION OF THE EVIDENCE

After a thorough evaluation of the entire record, it is concluded that the claimant has been disabled since July 9, 1990, and met the insured status requirements of the Social Security Act on that date and thereafter, through December 31, 1995.

The claimant was 50 years old on the date her disability began. The claimant has a 12th grade education. The claimant has not engaged in any substantial gainful activity since the disability onset date.

The claimant has the following impairments which are considered to be "severe" under the Social Security Act and Regulations: a history of lumbar disk surgery in January 1987, and cervical disc surgery in March 1987; post traumatic right, greater than left, hand numbness with decreased grip and intermittent hand pain; fibromyalgia syndrome; inflammatory polyarthritis; polypharmacy; hypothyroidism; degenerative joint disease; degenerative disc disease; depression; and passive dependant personality disorder. These impairments prevent the claimant from sustaining work activities. The claimant's condition fluctuates. She has some good days but the bad days out number the good days. Overall, she has a residual functional capacity for less than a full range of sedentary work.

The claimant's description of her limitations is consistent with the record when considered in its entirety. The claimant cannot perform her past relevant work and does not have transferable skills to perform other work within her residual functional capacity.

Given the claimant's residual functional capacity, and the vocational factors of her age, education and past relevant work experience, there are no jobs existing in significant numbers that the claimant is capable of performing. The claimant is under a disability as defined by the Social Security Act and Regulations.

FINDINGS

After consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the insured status requirements of the Act on July 9, 1990. The claimant has not performed any substantial gainful activity since July 9, 1990.

2. The claimant's impairments which are considered to be "severe" under the Social Security Act are a history of lumbar disk surgery in January 1987, and cervical disc surgery in March 1987; post traumatic right, greater than left, hand numbness with decreased grip and intermittent hand pain; fibromyalgia syndrome; inflammatory polyarthritis; polypharmacy; hypothyroidism; degenerative joint disease; degenerative disc disease; depression; and passive dependant personality disorder.

3. The claimant's impairments do not meet or equal in severity the appropriate medical findings contained in 20 CFR Part 404, Appendix 1 to Subpart P (Listing of Impairments).

4. The claimant's allegations are found to be credible.

5. The claimant's impairments prevent her from sustaining work activities. The claimant's condition fluctuates. She has some good days but the bad days out number the good days.

6. The claimant is unable to perform her past relevant work.

7. The claimant was 50 years old on the date disability began, which is defined as closely approaching advanced age. The claimant has a high school education.

8. The claimant does not have transferable skills to perform other work within her physical and mental residual functional capacity.

9. Based upon the claimant's residual functional capacity, and vocational factors, there are no jobs existing in significant numbers which she can perform. This finding is based upon the framework of Medical-Vocational Rule 201.14, 20 CFR Part 404, Appendix 2 to Subpart P, and the testimony of the Vocational Expert.

10. The claimant has been under a disability as defined by the Social Security Act and Regulations since July 9, 1990.

DECISION

Based on the Title II application filed on April 9, 1991, the claimant is entitled to a period of disability beginning on July 9, 1990, and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, and the claimant's disability has continued through at least the date of this decision.

Robin L. Henrie
Administrative Law Judge

December 21, 1992
Date

LIST OF EXHIBITS

Claudia A. Cox
CLAIMANT

528-74-9096
SOCIAL SECURITY NUMBER

WAGE EARNER(If other than Clmt)

SOCIAL SECURITY NUMBER

Exhibit No.	Description	No. of Pages
1	Application for Disability Insurance Benefits, filed 4-9-91	3
2	Notice of Initial Denial of Disability Insurance Benefits, dated 10-25-91	2
3	Request for Reconsideration, filed 12-17-91	2
4	Notice of Reconsideration Denial of Disability Insurance Benefits, dated 5-15-92	3
5	Request for Hearing, filed 7-7-92	2
6	Earnings Record, dated 7-22-91	2
7	Disability Report(s), dated 1-28-91	8
8	Reconsideration Disability Report, dated 11-20-91	6
9	Vocational Report(s), dated 1-28-91	6
10	Report of Contact, re: Company Disability Plan, dated 6-4-91	1
11	Report of Contact, dated 10-2-91	1
12	Claimant's Statement When Request for Hearing is Filed and the Issue Is Disability, dated 6-29-92	2
13	Disability Determination(s) by State Agency, Title II, Initial dated 10-9-91; Reconsideration dated 4-28-92 with attachments	14
14	Medical Records from Utah Valley Regional Medical Center, dated 1-5-87 to 1-13-87	10
15	Medical Records from Utah Valley Regional Medical Center, dated 3-9-87 to 3-15-87	9

LIST OF EXHIBITS

Claudia A. Cox
CLAIMANT

528-74-9096
SOCIAL SECURITY NUMBER

WAGE EARNER(If other than Clmt)

SOCIAL SECURITY NUMBER

Exhibit No.	Description	No. of Pages
16	Medical Records from Emery Medical Center, P.C. dated 5-31-88 to 12-7-90	14
17	Medical Report from David Herner, M.D., dated 8-30-91	3
18	Treatment notes covering the period from 10-3-88 to 11-25-91 by Lynn Gaufin, M.D.	23
19	Medical Records from Utah Valley Regional Medical Center, dated 11-25-91 to 2-4-92	6
20	Medical Records from Sterling Potter, M.D., dated 9-6-91 to 2-26-92	5
21	Medical Records from Joseph R. Watkins, M.D., dated 12-20-91 to 3-5-92	17
22	Medical Report from Delvin McFarlane, LCSW, dated 3-30-92	1
23	Resume of G. Barrie Nielson, Vocational Expert	2
24	Medical Records from Jeffrey L. Mathews, M.D., dated 4/7/92 to 8/12/92.	13
25	Medical Report from Lynn Ravesten, Ph.D., dated 11/12/92.	5

Appendix G:

Accident Report of August 15, 1988 and Co-Employee Statements

UP&LCo. Form 627-0049 9-87

NON-MEDICAL INJURY FORM UTAH

Distribution —
Original. Insurance Services
Yellow. Department/Plant Location
Pink Employee
Gold Safety Dept
Room 133 G.O.

To: INSURANCE SERVICES

Date August 15, 1988

Utah Power & Light Company

Name of Injured Claudia J. Cox
Please Print

I was injured at 2:50 A.M. (P.M.) today

Location of accident Hunter Plant - Castle Dale Street Avenue -

Work being performed Strained back opening filing cabinet drawer.

Part of body injured

Was first aid given? Yes ☐ No ☒ By whom

There is no indication that I will need to lose time on account of the injury but I will let you know immediately if it becomes more serious or if there is any indication of infection or other complications.

Division

Signed by Injured Claudia J. Cox

Department Planning Dept.

Signed by Supervisor

Questions, contact Ext. 7507 G.O.

This form is to be comp ed and turned in to Supervisor the day of injury.

First Report of Injury must be completed if treated by a doctor

February 13, 1989

To Whom It May Concern:

This memo is in reference to Claudia Cox's on-the-job injury of August 15, 1988. As her supervisor, on August 16, 1988, I investigated the cause of the above-stated injury as reported on the non-medical injury form.

Claudia had stated that she had strained her shoulder, neck, and back while opening a file cabinet at Karma O'Bryan's desk (a co-worker in the same office). I opened the same file cabinet and found it to be very heavy and sticking as I was trying to open it. I, then, used some silicone spray to lubricate the guides to allow the drawer to more easily open to eliminate any re-occurance of strain from opening this file cabinet drawer.

I am aware of another on-the-job injury dated 12/18/87 where a chair had slipped out from under Claudia causing her to fall while attempting to sit down. She informed me that this had caused her severe pain in her lower back and that she would take the muscle-relaxers and medication previously prescribed by her doctor to try to keep from having a lost-time accident.

Claudia has worked for me since 1980 and had a very good safety record up until the time of these accidents. I have found that she observes safety regulations and is conscious of our safety program and goals.

Signed,

James A. Williams

James A. Williams
Hunter Planning Supervisor

State of Utah
County of Emery

Notary Public
My Commission Expires 08/05/89

00017

February 13, 1989

To Whom It May Concern,

RE: Industrial Claim - Claudia Cox
August 15, 1988

At the request of Lee Hofeling, Investigator for Energy Mutual Insurance, I wish to affirm the fact that the file drawer in question was indeed heavily weighted with paper for work, and would also occasionally stick when pulling it out. On numerous occasions I would require the use of both hands to open the drawer. This problem was only known to me since I am usually the only one getting into this drawer. On the day that the accident occurred, I was absent from work and Claudia was doing my work plus her own, she needed to get into this drawer for supplies, and didn't know of the problem that I was having with this drawer.

Karma O'Bryan

Karma O'Bryan

State of Utah
County of Emery

Notary Public

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